89-1649

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

EDWARD I. ISIBOR

Petitioner

Versus

BOARD OF REGENTS OF THE
STATE UNIVERSITY AND COMMUNITY
COLLEGE SYSTEM OF THE STATE
OF TENNESSEE, ET AL.,

Respondents

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

VOLUME 1: PAGES 1 TO 61

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APRIL 5, 1990

QUESTIONS PRESENTED FOR REVIEW

1. WHETHER THE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL'S COURT'S REFUSAL TO RECUSE ITSELF AND THEREFORE EFFECTIVELY DENYING PLAINTIFF OF HIS DUE PROCESS AND STATUTORY RIGHT TO A FAIR TRIAL.
2. WHETHER THE COURT OF APPEALS ERRED IN ITS RULING THAT THE DEFENDANT'S INTEREST IN FULFILLING ITS EDUCATIONAL MISSION OUT-WEIGHED PLAINTIFF'S FREE SPEECH INTEREST.
3. WHETHER THE COURT OF APPEALS ERRED IN ITS FINDING THAT THE PLAINTIFF WAS NOT ENTITLED TO RELIEF UNDER TITLE VII.
4. WHETHER THE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL'S COURT PRETRIAL RULING THAT DEFENDANTS GARLAND, COX AND FLOYD WERE ENTITLED TO QUALIFIED IMMUNITY FROM CIVIL DAMAGES UNDER 42 USC SECTION 1983.
5. WHETHER RULE 24 OF THE SIXTH CIRCUIT COURT CAN BE USED TO SUBSTITUTE FOR SUBSTANTIVE LAWS OF THE UNITED STATES INCLUDING THE 1866 CONGRESSIONAL CIVIL RIGHTS STATUE AND THE CONSTITUTION OF THE UNITED STATES.

PARTIES

1. The Petitioner, Edward I. Isibor, is an individual and resident of Williamson County, Tennessee. Petitioner is a Naturalized United States Citizen from Nigeria.

2. The Respondent, the Board of Regent of the State University and Community College System of the State of Tennessee ("Board of Regents") is the governmental body which manages the affairs, policies and practices within the University System which includes Tennessee State University. The members of the Board of Regents are Ned McWherter, Gwen R. Awsumb, William O. Bach, Howard E. Board, Clifford H. Henty, Ross N. Fairs, William N. Farris, Thomas Ingram, Arlis Roaden, J. D. Johnson, Richard A. Lewis, Hubert McCullough, Charles Smith, A.C. Clark, Howard Warf., David White, Ed Williams, III and Abby Eloten, All of whom are being sued in their official capacities as members of the Board of Regents.

3. The Respondent, Roy S. Nicks, is an individual a resident of Davidson County, Tennessee and the former Chancellor of the Board of Regents. Said Respondent is being sued individually for actions taken under color of law.

4. The Respondent, Thomas Garland, is an individual, a resident of Davidson County, Tennessee and the Chancellor of the Board of Regents. Said Respondent is being sued individually for actions taken under color of law.

5. The Respondent, Tennessee State University under supervision of the Board of Regents and is located in Davidson County, Tennessee.

6. The Respondent, Otis L. Floyd, is an individual, a resident of Davidson County, Tennessee and President of Tennessee State University. Said Respondent is being sued individually for actions taken under color of law.

7. The Respondent, George W. Cox, is an individual and a resident of Davidson

County, Tennessee. Said Respondent is being sued individually for actions taken under color of law.

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The Petitioner, Edward I. Isibor, prays that a Writ of Certiorari be issued to review the judgment of the United States Court of peals, Sixth Circuit.

OPINIONS BELOW

The Judgment Order of the United States Court of Appeals, Sixth Circuit entered December 14, 1989 appears at page 62 of the Appendix herein.

The Judgment Order of U.S. District Court for Middle Tennessee District Tennessee dated October 12, 1988 appears at Page 82 of the Appendix herein.

The Pretrial Order of U.S. District Court for Middle Tennessee District Tennessee dated August 23, 1988 appears at page 115 of the Appendix herein.

JURISDICTION

The final judgment of the United States Court of Appeals for the Sixth Circuit is dated December 14, 1989. This Petition for a Writ of Certiorari is filed timely within ninety (90) days thereof.

The jurisdiction of this Honorable Court rests upon 28 U.S. C. §1254 (1) and Rule 10 of this Court.

FEDERAL PROVISIONS INVOLVED

1. FIRST AMENDMENT:

   "Congress shall make no law respecting an establishment of religion, or prohibiting the free exertise, or of the press; or the right of the people peaceable to assemble, and to petition and Government for a redress of grievances."

2. TITLE VII:
   "It Shall be an unlawful employment practice for an employer - (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of race, color, religion, sex or national origin; or'

3. AMENDMENT XIV: SECTION 1
   "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the unites States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This case arises out of a complaint filed by the petitioner on August 27, 1987 in the United States District Court for the Middle District of Tennessee, for salary discrimination under Title VII and retaliatory discharge under 42 U.S.C. Section 1983 and 1985 against the Board of Regents of the State University and Community College System of the State of Tennessee, (hereinafter Board), the individual serving as members of the Board, in their official capacities, and Dr. Roy S. Nicks (former Chancellor) and Thomas Garland (current Chancellor); Tennessee State University (hereinafter TSU), Dr. Otis Floyd, current President of Tennessee State University, Dr. George Cox, Administrator at TSU. In this suit, petitioner sought in addition to injunctive relief, reinstatement as Dean of the School of Engineering, and back pay against Defendants, Nicks, the Board and TSU as well as compensatory and punitive damages against the individual defendants (Respondents) Garland, Floyd and Cox.

On April 5, 1988 the District Court denied the defendant's motions to dismiss plaintiff's (petitioner's) claims against TSU under 42 U.S.C. Section 1981, 1983 and 1985 (R. 30 Order). The Court did dismiss, however plaintiff's claim for compensatory damages entirely and for retaliation under Title VII. The court further dismissed all Title VII claims for relief arising out of conduct prior to June 1, 1984 and for relief for retaliation arising prior to June 1, 1987. Summary judgment was also granted in favor of the defendants on all Title VII claims arising prior to January 1, 1985 based on the statue of limitations. All other motions to dismiss, and/or for summary judgment were denied without prejudice for their reassertion.

Also the trial court entered its Memorandum Opinion on August 23, 1988 in which it dismissed the defendant Roy Nicks as a defendant in his individual capacity and limited his liability to acts committed in his official capacity as former Chancellor. The court denied defendants

Board of Regents Motion for Summary judgment on the issue of its liability under Title VII, however, the court also found in favor of the defendants, Garland, Floyd and Cox granting their defense of qualified immunity on the Section 1983 claim (R. 83, Order).

The case proceeded to trial on October 6, 1988 the Honorable Thomas A. Wiseman, presiding, without a jury. Following some seven days of trial, the court issued its ruling from the bench on October 14, 1988. The court dismissed all claims for relief both under Title VII and 42 U.S.C. Section 1983 (R. 96, Order). Plaintiff timely filed a Notice of Appeal.

The Court of Appeals on December 14, 1989 affirmed all the rulings of the District Court.

STATEMENT OF FACTS

Edward Isibor, a Nigerian-born American citizen, was hired as the Dean of Engineering and Technology at Tennessee State University on August 15, 1975. He was awarded tenure in

1977 (TR. II Isibor 389). When the plaintiff first began his position, TSU did not have a graduate program in engineering. The level of outside funding for engineering was in the range of $25,000 to $30,000 per year. (TR II Isibor 396). Two of the engineering programs were not accredited nationally. Primarily, through plaintiff's efforts and his prior experience at such institutions as Howard University, Massachusetts Institute of Technology (MIT), Purdue University, Cleveland State University and Florida International University, TSU acquired national accreditation of all the four engineering programs and established a graduate program in engineering (TR. II Isibor 394-410). Enrollment at the School grew to double its size in 1975. Enrollment of White students jumped from 5 to 168. (TR II Isibor 418). Also the Engineering School was awarded the Koerper National Award by the National Society for Professional Engineers as having the best engineering program in the country in train-

ing students to become engineering professionals (TR. II Isibor 424). Throughout eleven years of his tenure as Dean at TSU plaintiff never received a written reprimand (TR IV - Isibor 143).

The Board of Regents has three unversities having engineering schools: Memphis State University (MSU), Tennessee Technological University (TTU) and Tennessee State University (TSU). For purposes of salary discrimination, the relevant period is from January 9, 1985 to June 30 , 1987. During this period, the Dean of Engineering at TTU was Leighton E. Sissom, a White male. The Dean of Engineering at MSU was Orville Eugene Wheeler, also a White male. (TR III Isibor 10, 11). Throughout the ten year period from 1977 to 1987, salaries for deans of engineering at the Board Universities varied considerably. (TR III Isibor - 11). Since 1979, the plaintiff became the most senior engineering dean in the State. Despite the plaintiff's seniority and high academic

qualifications he received a salary lower than that of any of his White counterparts at MSU and TTU (TR. III Isibor 15). In 1980 plaintiff filed an EEOC charge of discrimination and won a negotiated settlement with a recommended salary of $47,000 by President Humphries. However the Board of Regents under the direction of Chancellor Roy S. Nicks set plaintiff's salary at $46,624 to match the salary of the Dean of the School of Engineering at MSU (TR III Isibor 14). Again in 1983 (See Exh. 77) President Humphries recommended that the Board increase engineering salaries at TSU. The plaintiff was recommended for an increase from $49,888 to $52,632. Each of the salary increases was approved by the Board except that of the plaintiff (TR. III Isibor 18-20). Plaintiff was repeatedly advised that the reason for not increasing his salary to recommended levels was to maintain quality with that at MSU. (TR. III Isibor 21; Exhs. 78-80). Despite this policy, the salaries of the Associate Deans of

engineering at MSU and TSU were not maintained at an equal level. The TSU Associate Dean of Engineering Dr. Malkani (a Non-Black) consistently earned a higher salary than his counterparts at either MSU or TTU. (TR. III Isibor 25; Exhs. 81, 82 and 83). The amount of salary differential between the plaintiff and his White counterpart at MSU for the period in question was $12,726 (TR III Isibor 34).

Later in the course of term as Dean, the plaintiff became outspoken in mainly three areas of public concern: Management of funds, hiring practices of TSU and administrative autonomy. Plaintiff was invited to appear on several television and radio broadcasts to discuss these issues. Plaintiff's outspokenness on these types of issues prompted a warning from interim president Roy Peterson, wherein he advised plaintiff:

> "The Dean may speak as a private citizen on any issue he deems appropriate, however, any information on this (audit) report or any university finding should be addressed by this office." (Exh. 87.

Letter from Peterson to Isibor).

The attempt by Chancellor Garland and Interim President Roy Peterson to censor plaintiff's remarks by requiring that he channels his future comments through the "University Channels" met with concern by SBR General Counsel, Susan Short. (Exh. 88, 89 letters from Susan Short to Peterson and Isibor) At this time the plaintiff and interim president Peterson were candidates for the presidency at the University. Dr. Cox testified that he personally reviewed plaintiff's strengths and weaknesses in the Spring of 1987 and voted to recommend Dr. Isibor as one of the five finalists for the president of the university. (TR III Cox 486-486). Sam Latham testified that Chancellor Garland promised to terminate the plaintiff from the deanship and to send him back to the classroom.(TR II Latham 194-206).

On May 27, 1987 President Floyd sent a letter to the plaintiff praising him for the cooperation he has extended to him.

Two days later on May 29, 1987 President Floyd sent the plaintiff a second letter informing him that he had approved Dr. Cox's recommendation that the plaintiff be removed as Dean of Engineering.

The record shows that President Floyd received four salary increases during the fiscal year in which he terminated the plaintiff as dean. This was the first time in the history of the institution and of the State that a college president would receive four salary increases within one fiscal year. (TR. II Floyd 130-133). Also Dr. Cox testified that he was appointed to a newly created administrative position (Vice President of Administration) in an acting capacity as of October 1, 1987.(TR I Cox 144). He is now called the Vice President of Administration at the University. This position was never advertized and no one else was given an opportunity to apply for consideration for the job. These changes of status occurred for the two individuals at the university who

implemented the termination of the plaintiff as dean of the School of Engineering and Technology at TSU.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

Review by certiorari is appropriate in the case at bar under Rule 10(1)(a) and 10(1)(c) of the Rules of the United States Supreme Court because both the Sixth Circuit Court of Appeals and the Trial Court departed from the expected and usual course of judicial proceedings by failing to objectively (or unbiasedly) review all the issues and evidence that the plaintiff directed to their attention.

The Court of Appeals sanctioned the actions of the Trial Court when it acted under a biased state of mind in:

(1) Wilfully ignoring key testimonies on the plaintiff's side of the case.

(2) Misreading or twisting the contents of documentary and testimonial evidence in a biased manner to favor the defendants'

arguments.

(3) Relying on issues that the defendants established are irrelevant to the case at bar in making their rulings.

(4) Using claims not substantiated by the record as if they were proven facts in reviewing the arguments in this case.

(5) Publicly declaring a verdict in the case at the Trial Court level in favor of the defendants before hearing the plaintiff's side of the issue.

(6) Violating the innocent-until-proven-guilty doctrine by asserting that allegations of mistreatment by disgruntled personnel of the plaintiff to be true even when the defendants testified that they have never investigated any of them.

The courts below have acted in ways that are "So far departed from the accepted and usual course of judical proceedings". (Rule 10.1.(a) of the Supreme Court). Also the courts below decided a Federal question in

this case in a biased manner which conflicts with applicable decisions of this court. (Rule 10.1(c) of the Supreme Court)

The Supreme Court of the United States is the Court of the last resort that can bring about remedy where a litigant has been unjustifiably denied a fair and impartial trial. Therefore, the facts in this case merit this Court's review.

ARGUMENT

1. WHETHER THE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT'S REFUSAL TO RECUSE ITSELF AND THEREFORE EFFECTIVELY DENYING PETITIONER OF HIS DUE PROCESS AND STATUTORY RIGHT TO A FAIR TRIAL.

The deep involvement of judges in the Nashville Political Network has created a conflict-of-interest situation which denied the petitioner of his constitutionally guaranteed rights to a fair trial both at the Court of Appeals and the District Court levels.

The petitioner raised questions about the hiring process at the university, the lack of autonomy and the mismanagement of millions of university funds that go unaccounted for. Efforts to direct the attention of state officials to this problem were unheeded. The petitioner wrote a letter to Governor McWhether in 1986 bringing these concerns to his attention in his position as chairman of the State Board of Regents. A response from the Governor was received in 1987 after the termination of the petitioner as dean of engineering. The Governor was silent on the conflict-of-interest issue that the petitioner raised in his letter.

(See Appendix E)

Over the years, corruption in government has stained the image of the State of Tennessee to the outside world. In 1981 Governor Ray Blanton was sentenced to three years in Federal Prison for fraud in selling liquor licenses. Mr. Jake Butcher, two time gubernatorial candidate is currently serving a prison term for fraud charges. According to the Nashville Banner article of Dec. 12, 1989, "The Ongoing Federal and State investigation codenamed "Rocky Top" has uncovered evidence of bribes, fraud, conspiracy and gambling violations among lobbyists and legislators, public officials and private business people." To date, about 37 people have been indicted. It has led to State Representative Ted Ray Miller and the Secretary of State Gentry Crowell allegedly shooting themselves to death. The involvement of judges in the scandal spreading throughout the state has threatened the integrity of the judicial system. For instances Judge Sterlin Gray who was indicted on charges of bribery committed suicide.

Under this climate, an honest citizen like the petitioner who spoke out unraveling corruption

in government is harassed and denied a fair trial in the courts. In 1984 the petitioner was threatened that the top officials that are working against him were powerful enough to see that court cases against the petitioner could be heard by a judge of their choice. (See Appendix D). The actions of the Trial Court judge appear to substantiate this threat.

In its January 24, 1990 article, under the heading "Old Pals Urged To Aid Thomas", The Nashville Banner informed the public of a leakage in a Federal investigation regarding Sheriff Fate Thomas. It was reported that Mr. J.J. Hooker heard about a bribery probe by the FBI on Sheriff Thomas who allegedly was soliciting a bribe for his support of a Bellevue zoning ordinance that was being sought by some developers for a shopping center project. Mr. Hooker relayed this information to his former brother-in-law Judge Gilbert S. Merritt who is the Chief Judge of the Sixth Circuit Court of Appeals. Judge Merritt leaked information on this secret bribery probe to one of his friends in the Nashville Political Network - Mr. John Seigenthaler, the Publisher of The Tennessean. Mr. Seigenthaler in turn leaked

the information to Attorney William Willis, a member of the political network and the attorney for both Sheriff Thomas and the Tennessean. Allegedly after Sheriff Thomas learned of this bribery probe, he changed his stance and wrote a letter opposing the shopping center project. Several questions have been raised in the newsmedia as to whether or not Judge Merritt obstructed justice by leaking information on this bribery probe. Also whether or not the judge had violated Cannon Three of the Code of Judicial Ethics. It is however undisputed that the members of this closely knit political network act in various ways to protect each other. Therefore it is reasonable to question whether or not Judge Wiseman took a biased position against the petitioner so as to chill his exposure of corruption practices involving some members of their insider group.

On the contrary, one could have expected Judge Wiseman to recuse himself sua Sponte from a lawsuit involving his friends,

family members or businesses in which he owns an interest. Since Sheriff Thomas is in the same political network with him, Judge Wiseman acted appropriately by recusing himself from the Federal case against the Sheriff. Then why did Judge Wiseman fail to recuse himself sua Sponte from the Isibor vs. Board of Regents Lawsuit in view of the following reasons:

1. Judge Wiseman was formerly a member of the state legislature and therefore has had years of close working relationship with state officials such as Governor McWherter and Defendant Tom Garland.
2. Judge Wiseman was a democratic gubernatorial candidate in 1974 who is still completely associated with the inner circle of the party's organization in the state.
3. Judge Wiseman served as the State Treasurer in the past and has had years of close working relationship with the State Comptroller Mr. William Snodgrass

that the petitioner had spoken against. Mr. Snodgrass was questioned at length in this lawsuit during deposition.

4. The wife of Judge Wiseman (Mrs. Emily Wiseman) is currently serving as the Commissioner of Aging for the State of Tennessee and reports to Governor McWherter who is also the Chairman of the State Board of Regents - The Respondents. It is reasonable to question whether or not the judge might choose to align himself with the Respondents so as to protect the job security and other perks for his wife.

5. Attorney William Willis, who represents Respondent Roy Nicks, Judge Gilbert Merritt, Governor McWherter and Judge Thomas Wiseman belong to the same Nashville Political Network.

According to 28 USC 455 (a) a judge is expected to disqualify himself from a case when his impartiality may reasonably be questioned. The statue states, quote:

"Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

During trial, the District Judge also refused to recuse himself. The Court of Appeals erred in affirming the District Courts action because it ignored several instances such as the following in which the District Court exhibited its bias:

1. Alleged Overexpenditure of the General Electric (GE) Grant

The petitioner alleged the declaration of a false overexpenditure on the GE grant which resulted in the defendants withdrawing some $59,000 from other school's private funds. To clear the air, the petitioner and members of his school challenged the defendants to produce the requisitions involved in this transaction. The defendants could not provide any documentation in this regard. Then during discovery, the petitioner subpoened the respondents to produce the

requisitions. They refused and the trial court supported the motion of the respondents saying with a condition that they did not have to produce the documentation: The Trial Court said "For the present, I'm going to quash the Subpoena duces tecum, and Ms. Wood is subpoenaed and if it becomes apparent that you're being unfairly treated in this matter Mr. Booker, I reserve the right to reverse myself." (TR I-451 Line 3-8) Mr. Booker was the petitioner's attorney at trial. The Trial Court therefore treated the petitioner unfairly when it asserted in its ruling with no substantiating evidence that the petitioner and his school overexpended the GE account. The Court of Appeals ignored the petitioner's call for it to review this question and to request the requisitions that have not to date been submitted.

2. Diversion of Funds from the Capital Outlay Funds for the School of Engineering and Technology.

In its ruling the Trial Court said, quote "Dr. Isibor's questions about reallocation of funds away from

engineering building, although Dr. Isibor insisted that Ron Dickson quote, diverted the money from the project, Carl Norman Johnson's affidavit clearly indicates that no money was diverted--"

(Page 99 Appendix B)

To the contrary both Ron Dickson and Carl Norman Johnson testified that the petitioner's claim regarding diversion of funds to be true. (See TR IV Dickson 446) and (Joint Appendix at Page 775: Exhibit 134).

The Trial Court therefore used erroneous data, not substantiated by the records in ruling in the case at bar. The Court of Appeals also chose to ignore this misuse of the evidence. The Supreme Court needs to review the records in this regard to ascertain the bias with which the courts below handled this case.

3. Computer Purchase

The University bought some 15 Franklin Ace 1000 Computer terminals at a listed price of $861.00 each, but the University reported an inflated price

on the inventory sheet of $1,847.64 was paid for each. To explain the difference respondent Cox said that insurance cost accounted for the difference. The trial court refused to accept this explanation. However the respondents came back at a later date and claimed that actually $1,583.00 was paid for each of the terminals. Still this cost was $722.00 over invoice for each terminal. Surprisingly the trial court accepted this dubious explanation which failed to answer why a computer terminal costing $861.00 each was listed at a purchase cost of $1,583.00 each.

The court of appeals failed to question this action by the trial court. In short, any answer by the respondents to a question was biasedly accepted as correct. The use of such incorrect data cannot be justified in a court, where impartiality is expected to reign.

(Joint Appendix Page 1114-1116)

4. Unequal Treatment

Judge Wiseman excluded any testimony based on individual perception from witnesses. For example on several occasions during the questioning of petitioner's witnesses, the trial court stated:

> "Sustained, sustained, Mr. Booker, you get on something that has to do with this lawsuit not what this man's perception is" (Joint Appendix Page 341)
> (Emphasis added)

> "Once again that is accepted for the purposes of this man's perception, not the truth of the matter contained in it." (Joint Appendix Page 350)
> (Emphasis added)

In spite of these restrictions on the testimonies of petitioner's witnesses, the trial court welcomed as established facts the contents of late filed Exhibit #19 which listed the perceptions of defendant Cox. Both the court of appeals and the trial court relied mainly on the contents of this exhibit in ruling against the petitioner.

5. Extrajudicial Source as a Basis for

Recusal

The court of appeals failed to trace where the district court judge got his information that the petitioner belonged to a faction opposed to the desegregation of Tennessee State University. Neither the petitioner nor any of his witnesses had ever appeared before Judge Wiseman on this issue. Also no evidence has been provided that any one else had ever made such a wild accusation against the petitioner in Judge Wiseman's court. Therefore one is led to the inescapable conclusion that Judge Wiseman got his information from an extrajudicial source. According to United States v Storey 716 F. 2d 1088 (6th Cir. 1983) such a personal bias as distinguished from a judicial one is sufficient to justify recusal in a case.

The trial court also declared during trial quote "I've said I'm going to disregard the other aspects of their

testimony." in reference to those he claimed belonged to this faction. However in the ruling both of the court of appeals and the trial court ignored the testimonies of key witnesses such as Samuel Latham, Fred Humphries and Richard Lewis.

6. Verdict Before Hearing Petitioner's Rebuttal

After plaintiff's proof at trial, defendants introduced in a new charge regarding alleged mistreatment of staff. Although defendants Cox and Floyd testified that they have never investigated any of the allegations, the trial judge used them as facts and declared, quote: "But Mr. Booker, your lawsuit is wholly without merit with one exception, and that's what I want to hear further proof on. That's the extra service pay request." (TR V 390)

In other words the trial court heard the defendants side of a new charge and before providing the plaintiff the opportunity to rebut, it decided in favor of the defendants. This announcement was widely publicized.

2. WHETHER THE COURT OF APPEALS ERRED IN RULING THAT THE DEFENDANTS' INTEREST IN FULFILLING ITS EDUCATIONAL MISSION OUTWEIGHED PLAINTIFF'S FREE SPEECH INTEREST.

In reviewing the petitioner's allegation of retaliation for the exercise of his constitutional rights of free speech, both the court of appeals and the trial court identified the following four tests. First, whether the employee's comments address matters of public concern, Connick v Myers 461 US 138, 145 (1983). The second task is to balance the employee's interest to speak against the employer's interest in promoting the efficient performance of its public service, Pickering v Board of Education 391 US 563, 568, (1968). Then the causation factor in which the employee must show the protected comments were a substantial or motivating factor in his discharge. Finally, in the fourth test the employer has the opportunity to show by a preponderance of the evidence that it would have discharged the

employee even absent the protected speech, Mt Healthy City Board of Education v. Doyle, 429, US 274 US 274, 287 (1977).

The court of appeals and the trial court erred in ignoring the testimonies of key witnesses of the plaintiff in conducting the various tests. Mr. Sam Latham, a local newspaper reporter testified in detail on his discussions with Chancellor Tom Garland and narrated how the Chancellor was displeased with the plaintiff for speaking out publicly on the University concerns (TR. II Latham 195-196). Also in his testimony, Mr. Latham testified on how the defendants planned to retaliate on the petitioner for speaking out on issues such as the mismanagement of funds at the university:

Q. What was the indication as to how to deal with Dr. Isibor?
A. Well, that....if he didn't come in line with what was considered unified course that was set, then he would be put back in the classroom.
Q. This is what was Dr. Nicks recommendation on how to deal with the problem?
A. Right.

Q. Was there any indication as to what was being done while Dr. Humphries was president in terms of dealing with that problem?

A. He did relay that that had been discussed with Dr. Humphries and that recommendation had been put to Dr. Humphries

(TR. 11 - Latham 198)

Also defendant Garland discussed with Mr. Latham on the procedure to be followed in terminating the plaintiff from the deanshi

Q. In terms of statements by Chancello Garland as far as sending Dr. Isibo back to the classroom, was there an indication given as to how the Chancellor would accomplish that; isn't the president the one who removes the dean?

A. Well, it would be done through the president; that the president would be the official-----make the offici demotion or removal.

(TR 11 Latham 200)

Dr. Humphries who was President at the university during ten of the twelve years the petitioner served as dean also testifi that a Vice Chancellor of the Board reques at a meeting with defendant Roy Nicks that he remove the plaintiff from the deanship. Humphries declined because there was no reason to justify such an action. To him,

the plaintiff was one of his best deans at the university. (TR IV Humphries 182-183) When Humphries declined this task was given to subsequent presidents to implement. Latham testified that Interim President Peterson (who assumed the presidency after President Humphries resigned) had been approached, even prior to the termination of the petitioner, by respondent Garland and and advised of the manner in which the firing would take place. It is important to note that the record shows that the respondents have acted on several occasions to chill the exercise of the freedom of speech. This fact was ignored by the courts below in weighing the Pickering balance. President Humphries testified that he was also requested to fire Sterling Adams who was the Executive Assistant to the President.

"Q. Did the request come from the Board of Regents

A. I believe that my testimony was that the Chancellor asked me to fire Sterlin Adams."

(TR. IV Humphries 180)

President Humphries declined to do this. But on the first day on the job Interim President Peterson fired Sterlin Adams to comply with the directives of the Board's Staff.

The Courts below also intentionally ignored the contents of the deposition of Richard Lewis who is Vice Chairman of the Board of Regents. Mr. Lewis, who is in a position to know the facts behind any decision by the Board or its staff, attributed the petitioner's outspokenness to the decision to terminate the petitioner:

> "Q. As far as that perception of yourse and people in the community, is tha perception that had Dr. Isibor not been so outspoken he would still be dean"
> A. Uh-huh
> Q. That's a yes"
> A. Yes"
> (Exhibit 173 on Page 1255 of Joint Appendix).

The court of appeals in its review of Marohnic v. Walker 800 F. 2d 613, 616 (6th Circuit 1986) stated that "(P)ublic interes is near its zenith when ensuring that publi

organizations are being operated in accord-with law----and seeing that public funds are not purloined." The petitioner in a similar situation to Marohnic, exposed what he and many others perceived as corrupt and wasteful practices. As a result of the petitioner's insistence on the truth, the public came to know that the amount of investment that the respondents first claimed to be only one million dollars was actually four million dollars. (Tr. IV Dickson 486). Also the respondents changed their story during trial on the difference in video machine receipts reported versus what was actually received. At first they said it was only $50.00. Then it was increased to $2,500.00 or $2,600.00 finally respondent Floyd testified it was $80,000.00. The public was pleased with the actions of the petitioner in this type of situations and as a result they took an unprecedented action to push him for the presidency at the university. (See Appendix J). The public interest served by the petitioner's outspokenness in this way was

not recognized by the courts below in making the Pickering balance test. Instead they regarded the petitioner as insubordinate for refusing to accept questionable explanations given by his superiors. Even nowadays in 1990, the public is still asking questions about lack of accountability for funds at TSU. (See Appendix H)

The courts below also relied extensively on issues that the respondents themselves said were irrelevant to the case at bar, in making their rulings. Respondent Cox, the man the respondents claim initiated the move to terminate the petitioner, testified that the only reasons for the termination decision were only those stipulated in the May 29, 1987 letter of termination.

> "Q. Okay, so these things listed as late-filed Exhibit 19. They didn't contribute to your recommendation?
> A. These were things --I could not separate those things happening and being in the back of my mind. These are not the things I stated in the letter as reasons why I made the recommendation
> (TR 1 Cox 359-360)

(This defendants late filed Exhibit 19 is in Appendix I).

Respondent Floyd who as President received the recommendations from Cox (then Acting Vice President of Academic Affairs) also ruled out the issues that the courts below relied on in tipping the balance in favor of the respondents. Floyd testified as follows:

"Q. Things that happened before you came in 1986 had no bearing on the decision of removing Dr. Isibor?
A. They did not." (TR VI Floyd 68)

Therefore both Cox and Floyd asserted that allegations of mistreatment of staff as not the reason for the termination decision. This is reasonable because they testified that they have never investigated any of the allegations of mistreatment of personnel and therefore there was no basis for declaring the petitioner guilty of the charges (TR 1 Cox 149). In its ruling the trial court said

"The court has observed the manner and demeanor of the many witnesses, although the court acknowledges and credits the testimony of witnesses who stated that they did not think that Dr. Isibor mistreated his employees, it also credits the accounts of the various

instances of mistreatment which were related; -----." Despite saying the above, the trial court regarded the allegations by some disgruntled former employees of the petitioner to be absolutely true.

Since the respondents testified that they have never investigated any of these allegations of mistreatment of personnel before making the termination decision then how did the courts below reached the conclusion that the petitioner mistreated personnel reporting to him and this led partly to the decision to terminate him.

The trial court alleged that the petitioner's outspokenness led to some disruption of university operations. To the contrary the letter of termination of May 29, 1987 did not mention any such disruptive behavior. Instead it praised the petitioner for his leadership. The only reference made in this regard to petitioner's outspokenness was by Mr. Ron Dickson at trial when he said:

> "I think it reduced the level of trust between my office and other office of the

institution, and made it difficult to communicate and get a sense of cooperation." (TR IV Dickson 456).

Later on Ron Dickson himself testified that no one had ever indicated to him that the plaintiff's speech on these issues reduced their level of trust in him or his staff.

"Q. Has there been any person that has indicated that they have less trust because of Dr. Isibor's concerns he had raised?
A. No, not directly."
(TR IV Dickson 485)

The matter of fiscal mismanagement at TSU was and still is a public issue that has received much attention in the news media. All the three finalists for the presidency at TSU including the petitioner and respondent Floyd expressed their views on this topic. Moreover, Ron Dickson who was the Vice President of fiscal affairs at TSU was singled out by several members of the public as being at least partially responsible for the misinvestment of one million dollars. Thus, he had reasons to feel that the level of the community's perception of the integrity or competence of his office

had dwindled. Indeed these perceptions may have been founded given the recommendations in the 1986 Audit Report which had several negative findings of deficiencies in the internal control and accounting procedures followed by TSU. Specifically the audit recommended (1) closer monitoring over investments (2) lighter controls over disbursement (3) internal controls over cash receipts and (4) more attention to drawndown procedures on federal funds and supporting documentation. (Exhibit 91, Joint Appendix Page 1066). Therefore just as in Rankin v McPherson - U.S.-, 107 S.ct. 2981 (1987), there is no objective evidence that the petitioner's speech actually "had any negative effect on the morale or efficiency" (Emphasis by underlining added) of the university. 107 S. Ct. at 291 (J. Powell Concurring). The clear weight of the evidence is to the contrary.

The courts below based their decisions on issues of mistreatment of staff and disrup-

tion of university operations of university operations which are not substantiated by the records. Respondent Cox testified as to the role he played as a member of the Search Committee for the Presidency at TSU in promoting the candidacy of the petitioner:

"Q. Did you play any role or the other with regard to whether the Committee included him in the five finalists?

A. Yes. The Chancellor had charged us as Chair of the Search Process to read very carefully the resumes of all the candidates, and then to come back and report on your findings, the strengths and weaknesses of your various candidates. So I participated rather vigorously in that process.

Q. Did you play any role specifically as to whether Dr. Isibor was going to be included or not included in the five finalists?

A. I think, again, I stated what I perceived to be Dr. Isibor's strength and weaknesses, and when it came down to finalizing or reaching the final five. I think I voted in favor of Dr. Isibor being a candidate being one of the five." (TR III. Cox 486) (Emphasis added)

The above review was conducted by respondent Cox in early part of 1987 between January 1987 to March 1987. The Courts below failed to examine the question, what happened between March 1987 and May 1987 that prompted

Dr. Cox to completely reverse his perceptions of the petitioner as an administrator? The testimonies of former President Humphries and Sam Latham have firmly established the fact that the Board of Regents Staff had planned to fire the petitioner for his outspokenness. This task was given to the new President Floyd (who was named in March 1987) and his acting Vice President for Academic Affairs to implement. Since this action was taken Dr. Cox was named to a new position (next in command to the President) as the Vice President of Administration. This position was not publicly announced and no other person was allowed to compete for the position. Therefore there is a direct inference that this was a payoff to him for helping to implement what the Board Staff wanted. Also the new President Floyd was given four salary raises just after his termination of the petitioner as dean. This is the first time in the history of the State that any president of a state institution will receive

four salary increases within one year.

The courts below also concluded without any substantiation from the records that by a preponderance of the evidence that plaintiff would have been removed as dean even if his public statements had not been made. The following facts raise serious questions in regard to the above conclusion.

1. The respondents considered the petitioner as one of several candidates for the presidency at the university from 1985 to 1987. During this period, the petitioner advanced among about one hundred candidates to the final ten and then to the final three in March 1987. The question now is, <u>if there were reasons to justify his termination as dean in 1987 why were the same reasons not used by the defendants to remove the petitioner from consideration for the position of the president of the university</u>?

2. The record shows that between 1975 to 1985 when the petitioner was not running for the presidency at the university, the petitioner in his annual evaluation was rated either as "very good" or "exceptional". This record also shows no written reprimand in his personnel file. President Humphries who testified as a defendants witness said that during the ten years (1975 to 1985) the petitioner was one of the best deans at the university (TR IV Humphries 189).

3. The respondents had requested President Humphries to terminate the petitioner during his tenure between 1975 and 1985 and he testified that he refused because there were no reasons to justify such an action. (TR IV Humphries 182-183). Then what are the "preponderance of evidence" that the courts below claimed were sufficient to terminate the petitioner even without his public speech?

4. In the seventy-eight years in the life of

institution, no dean except the petitioner has ever been fired. Yet the petitioner was the first dean to be rated so highly by the public as to rise up to becoming one of the three finalists for the presidency.

5. Richard Lewis testified that as Vice Chairman of the Board of Regents that he was of the opinion that the petitioner had done "an excellent job at TSU in terms of the engineering program, and most especially in terms of TSU as a whole" (Exh. 173 Deposition of Richard Lewis at Page 25). Furthermore Lewis added "If I had my way about it I would still consider him as being dean." Id.

6. The petitioners performance as dean netted a national award for the engineering program that he headed. For winning the Koerper Award by the National Society of Professional Engineers, the petitioner received several commendations for his leadership from Secretary of Education William Bennett on behalf of President Reagan, the State of Tennessee Legislature, the Nashville City Council.

Also the respondents (Board of Regents) passed a resolution honoring the petitioner and his staff forthis achievement.

ARGUMENT

3. WHETHER THE COURT OF APPEALS ERRED IN IT FINDING THAT THE PETITIONER WAS NOT ENTITLED TO RELIEF UNDER TITLE VII.

The petitioner has proven by a preponderance of the evidence in the courts below that a prima facie case of discrimination exists. The respondents then pointed out that the following unwritten guidelines are used in setting salaries: (1) Seniority (2) Degree Field (3) Salary of the president as cap (4) Availability of funds (5) Size and Complexity of the University.

Seniority

The Dean of the Tennessee Technological University (TTU) from July 1, 1975 to September 1, 1979 was James S. Brown (a White Man) and thereafter

Leighton E. Sissom (a White Man). In his testimony James Vaden, the Vice Chancellor of Fiscal Affairs of the Board of Regents said Mr. James Brown who did not have the doctoral degree was paid a higher salary than the petitioner (a Black Man) because of his seniority or longevity. (TR V Vaden 74). Mr. Vaden also admitted that although the plaintiff became the most senior engineering dean in 1979 at no time did his salary exceed the salaries of the new White engineering deans at Memphis State University (MSU) and TTU. (TR V Vaden 75).

The courts below failed to recognize that the seniority factor was being used in a discriminating manner. A White dean (James Brown) was entitled to a higher salary because of seniority but when a Black dean became the most senior in the State the rule did not apply to him and he was paid the lowest salary.

Degree Field: This factor was not proven

to be a reason for the lower salary for the petitioner because both the petitioner and the dean of engineering at Memphis State University are both civil engineers by profession.

Salary of the President as cap: The assertion that the salary of the Presiden of the institution was a cap except for those in the medical and law schools is also a pretext. The respondents paid the deans at both MSU and TTU a higher salary than the Black President of TSU for the 1984-85 fiscal year for an example. Obviously the respondents should not be allowed to use discrimination against the TSU President to justify discrimination against the petitioner. The proofs show that the TTU's dean of engineering made $200 more than the TTU's president in the 1986-87 fiscal year. Therefore, the respondents violated this unwritten guideline that the president's salary as the cap in setting the salaries of

engineering deans.

Availability of funds: The president of an institution should be the one to draw the conclusion as to whether or not there is money in the budget to fund his salary recommendations. The respondents repeatedly rejected TSU president's recommendation for salary increases for the petitioner despite the fact that the university said it had sufficient funds (TR IV Humphries 173). The court of appeals in supporting the biased stance of the district court said "The facts established that due to TSU's chronic overstaffing problems, the pool of funds from which salaries could be drawn as small." This is a pretext because the recommended salaries for other individuals such as Dr. Mohan Malkani (a non-Black) Associate Dean of Engineering at TSU were approved without question. Mr. Vaden also testified under oath that it was his understanding that funds were available at the university to pay the salaries recommended for the petitioner.

(TR. V Vaden 46).

In the 1980-81 year respondent Nicks also approved the payment of an academic year salary of $34,000 (the equivalent of a fiscal year salary of $42,500) to a White Male offered employment in the TSU School of Engineering as an Associate Dean under the supervision of the petitioner. This was at a time when the petitioner's salary was $40,652 for that fiscal year. Therefore, if funds were available to pay a White Associate Dean a salary higher than that of his boss, the Black dean, the availability of funds was used only as a pretext.

Size and Complexity: The overriding testimony in this regard is that of respondent Nicks himself. Nicks testified as follows:

"Q. You indicated that you had reviewed the program in 1979-80 found a degree of comparability?
A. Yes
Q. And again, the following year.
A. Yes
Q. And again, the following year?

Q. But then in subsequent years the salary of the Memphis State dean was allowed to increase above Dr. Isibor, is that correct?

A. I believe that is correct.

Q. Did you do any review of the salaries at that point in time that lead you to believe they weren't comparable?

A. No."

(TR V Nicks 138-139).

This testimony clearly shows that since no new study was conducted between 1980 and 1987 salary decisions had to be made on the basis of the 1979-80 study that found the programs at TSU and MSU comparable. Again the courts below ignored the above testimony of respondent Nicks in making their rulings. The court of appeals claim that "There was no attempt to make the salaries uniform among the universities under the Board's control." is therefore clearly erreneous. In fact on two occasions the salary recommended for the petitioner was reduced by respondent Nicks so as to make the salary of the petitioner equal to that of the dean of engineering at MSU.

1. A salary of $47,000 had been recommended for the petitioner for the 1981-82 fiscal year by the president as a result of a negotiated settle-

ment over an EEOC complaint. The recommended salary was reduced by the respondents so as to match the salary of the petitioner at TSU to that of the dean of engineering at MSU.

2. Again in 1983 respondent Nicks in his letter of March 15, 1983 to President Humphries disapproved the recommended salary increase for the petitioner. This was the only salary disapproved. Again that for the Non-Black Associate Dean was approved without question. Respondent Nicks said that he reduced the recommended salary of the petitioner from $52,632 to $51,888 so as "to keep academic administrative people at the various institutions together on a salary basis." (Exhibit 78: Letter of March 15, 1983 from Nicks to Humphries Joint Appendix Page 74).

Therefore this clearly shows that the court of appeals erred when it said in its ruling that "There was no attempt to make the salaries uniform among the universities under the Boards control."

Also in its ruling the court of appeals said "The Board referred the proposed increase to TSU's new interim president for review, but no recommendation was ever resubmitted to the Board." A review of the memo of July 2, 1985 from James Vaden to Interim President Peterson will show that the respondents did not request any review of the recommended increase in salary for the petitioner. (Joint Appendix Pages 1041 and 1042). Mr. Vaden only requested the interim president to review the recommended salaries for the following three employees - Ms. Juanita Bufford, Ms. Edwina Farmer and Ms. Forrestine Williams. Such a review as not requested for the petitioner. The record in this case again runs contrary to the claim of the courts below.

Finally, even if we limit the scope of this investigation to only how the petitioner was treated compared to other engineering administrators at TSU, we still find evidences of discrimination against the petitioner. As mentioned earlier, respondent Nicks approved a higher salary than that of the petitioner to

a prospective White Associate Dean of Engineering who was to be reporting to the petitioner who was then dean. (Joint Appendix Page 230). Also in the March 1983 letter to President Humphries respondent Nicks only referred to the petitioner as an academic administrator. He failed to recognize that Dr. Malkani the Non-Black Associate Dean is also an academic administrator and ought to have been treated the same way the petitioner was treated if the excuse he gave was not a pretext.

The court of appeals and the district court did not even consider the discrimination within the university (TSU) that the petitioner was subjected to in making their rulings.

In Price Waterhouse v. Hopkins, 57 U.S. L.W. 4469 (U.S. May 1, 1989) reversing and remanding 825 F. 2d 458 (D.C. Crt. App. 1988) the United States Supreme Court made a significant departure from the burden shifting rule previously established in McDonnell Douglass

Corp. v. Green 411 US 792 1973 and Texas Dept. of Community Affairs v. Burdine 450 US 248 (1981) which rule was relied upon by the trial court in this case. Based on the rule as now clarified in Price Waterhouse.

> "(A)n employer may not prevail in a mixed motives case by offering a legitimate and sufficient reason for its decision if that reason did not motivate it at the time of the decision." 57 U.S. L.W. at 4476 (Emphasis added)

In view of the above, the dubious data presented at trial regarding the size and complexity of the engineering programs cannot be relied on because respondent Nicks already admitted that no new study led to his actions to pay the dean of engineering at MSU a higher salary than that for the petitioner at TSU (TR V Nicks 138-139).

4. WHETHER THE COURT OF APPEALS ERRED IN AFFIRMING THE TRIALS COURT PRETRIAL RULING THAT DEFENDANTS GARLAND, FLOYD AND COX WERE ENTITLED TO QUALIFIED IMMUNITY FROM CIVIL DAMAGES UNDER 42 USC SECTION 1983

In its pretrial memorandum of August 23, 1988, the trial court granted the defendants

Garland, Floyd and Cox motion for summary judgment as to the issue of qualified immunity from civil damages under Section 1983, relying solely on the fact obtained through discovery to that point. The trial court then focussed its inquiry initially into whether the issues addressed by petitioner were matters of public concern. (R. 97 16-24 Transcript of Ruling). After reviewing the various issues which petitioner spoke on, the trial court concluded: "Upon consideration of the foregoing, one matter is clear, public officials could reasonably have disagreed over whether plaintiff's "expression of concern" were protected by the First Amendment."
(R. 97 at 22 Transcript of Ruling of Trial Court).

The "clearly established right" at issue in the case at bar is a public employee's freedom to speak out on issues of mismanagement of public university funds. There can be no genuine dispute but that the defendants Garland, Floyd and Cox each appreciated the protected nature of plaintiff's outspokenness on this issue.

(See Supra III.D.). Floyd even admitted to Sam Latham that he "expected the plaintiff would file a lawsuit" after their removal of him as dean. Defendant Garland also was advised of the protected nature of the plaintiff's speech by General Counsel, Susan Short, as early as February 18, 1986 (See Exhibit 77 Letter from Susan Short). Given the high level of public and media attention being given to TSU fiscal policies from sources other than the petitioner, an objective reasonable observer would have recognized that the issues which the petitioner addressed were of obvious public concern. This being the case, administrators of public universities who possess even a modicum of awareness of the constitutional rights of their employees, knew or should have known in 1987, that retaliation against an employee for speaking on public issues would violate his right to free speech. Moreover Respondent Cox was a defendant

in the John Arthur, et. al. v. Humphries et. al, case No. 813261 in the U.S. District Court for the Middle Tennessee in which Judge L. Clure Morton supported the notion that "The plaintiff and all faculty members are possessed of the constitutional right to express opinions concerning the administration of the university and may freely communicate such opinion to the media, other faculty members and administrators." The plaintiffs in the above case are mostly White faculty members at TSU. The question now is, why is the petitioner in this case who is Black being denied the same speaking privileges, especially during a time that he was a candidate for the presidency?

Finally not only should this issue of qualified immunity gone to trial, but, at the very least petitioner was entitled to a factual finding by the trial court on which it based its conclusions that these respondents were entitled to qualified immunity.

5. WHETHER RULE 24 OF THE SIXTH CIRCUIT COURT CAN BE USED TO SUBSTITUTE FOR SUBSTANTIVE LAWS OF THE UNITED STATES INCLUDING THE 1866 CONGRESSIONAL CIVIL RIGHTS STATUE AND THE CONSTITUTION OF THE UNITED STATES.

The sixth Circuit Court of Appeals designated its ruling in this case as "Not Recommended for Full-Text Publication." Therefore, Sixth Circuit Rule 24 limits citation to only specific situations. This poses an undesirable restriction to full access to the total record in this case. The plaintiff has cited several instances of misuse of judicial authority both at the trial court and the court of appeals levels. Therefore, the use of Rule 24 in this case would be self-serving because it will hide the truth from the public. The testimonies of plaintiff witnesses such as Sam Latham were not disputed by the defendants; yet the courts below chose to ignore them. An objective reviewer of the record will surely ques-

tion these omissions. We are fortunate that the vast majority of judges in this nation perform their duties with high integrity and in compliance with the dictates of the constitution. However, the nation can ill afford to divert its attention away from the few instances of judicial misconduct. In furtherance of this view, the plaintiff has used his limited resources to seek justice in face of insurmountable odds.

A complete exposure of the record will hopefully serve as a useful teaching tool to students of law. Rule 24 of the Six Circuit Court does not favor the citation of unpublished decisions. Therefore, it does not have the appropriate check-and-balance feature that will allow close scrutiny of all decisions of the Sixth Circuit Court. In his lawsuit, the plaintiff has been subjected to several injustices both at the trial court and the court of appeals levels.

The trial judge boldly declared that "I've said I'm going to disregard the other aspects of their testimony." (TR. II Court 345-347).

The trial court then acted to do exactly that by blocking out of its consideration all of the testimonies from several of the plaintiff's key witnesses. This exclusion of relevant aspects of the testimonies of plaintiff witnesses effectively denied the plaintiff of his due process to a fair and impartial hearing. In fact, the trial judge did not even try to hide his bias for the defendants and against the plaintiff. He shouted at the plaintiff and his witnesses and openly treated the defendants and their witnesses in a friendly manner. At one instance, Judge Wiseman poured water into a cup and walked to the witness stand to give it to the defendant Cox. Such an expression was not extended to the plaintiff and his witnesses.

"The Court: Would you like some water?

The Witness: That might be helpful."
(TR III Court 420)

The plaintiff therefore believes that the total record in this case should be open to the public. The record would hopefully serve as a useful case study on the "dos and don'ts" in our judicial system.

A review of this court in its supervisory role is needed to see if or not Rule 24 will be used simply to conceal the unfair decision in this case.

CONCLUSION

For all of the foregoing reasons a writ of certiorari should be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit.

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89-1649

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

EDWARD I. ISIBOR

Petitioner

Versus

BOARD OF REGENTS OF THE
STATE UNIVERSITY AND COMMUNITY
COLLEGE SYSTEM OF THE STATE
OF TENNESSEE, ET AL.,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

VOLUME 2: PAGES 62 TO 150

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April 5, 1990

APPENDIX A.

No. 88-6286

UNITED STATES COURT OF APPEALS
FOR THE SIXTH COURT

EDWARD I. ISIBOR,
Plaintiff-Appellant,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

v.

BOARD OF REGENTS OF THE STATE UNIVERSITY AND COMMUNITY COLLEGE SYSTEM OF THE STATE OF TENNESSEE, et al.,

Defendants-Appellees.

Before: NELSON and RYAN, Circuit Judges; and MEREDITH, District Judge.*

RYAN, Circuit Judge. Plaintiff Edward I. Isibor appeals the judgement for the defendants on his Title VII salary discrimination claim, 42 U.S.C. § 2000e et seq., and his § 1983 first amendment retaliatory discharge claim, 42 U.S.C. § 1983.

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* The Honorable Ronald E. Meredith, District Judge for the Western District of Kentucky, setting by designation.

On the salary discrimination claim, the district court found that plaintiff failed to prove that the reasons articulated by defendants for plaintiff's salary level were merely pretextual.

On the retaliatory discharge claim, the court found that defendants' interest in fulfilling its educational mission outweighed plaintiff's free speech interest, and that, in all events, defendants established that plaintiff would have been terminated absent the exercise of his free speech right.

We conclude that the district court did not clearly err in finding for defendants on both of plaintiff's claim and therefore, we affirm.

I.

In 1975, plaintiff, a black Nigerian-born, naturalized citizen, was hired as Dean of Tennessee State University's (TSU) School of Engineering and Technology. In 1987, he was removed as dean but remained on the TSU

faculty as tenured professor. Following his termination as dean, plaintiff filed suit for salary discrimination under Title VII, 42 U.S.C. § 2000e et seq., and for retaliatory discharge for exercising his first amendment right to free speech in violation of 42 U.S. C. § 1983[1]. Plaintiff's salary discrimination suit was based on the claim that his salary as engineering dean at TSU was less than was paid to the white male engineering dean at Memphis State University (MSU) and Tennessee Technological University (Tech). TSU, MSU and Tech are governed by defendant State Board of Regents. Plaintiff's § 1983 Retaliatory discharge claim is that he was removed as dean at TSU in retaliation for his public statements critical of TSU's management of its financial affairs.

---

[1] Plaintiff also alleged that in retaliation for exercising his first amendment right, he was denied extra service pay for "grant work" he performed. The district court found the refusal to pay plaintiff the extra service pay he requested was not due to any constitutionally prohibited motive. Plaintiff did not appeal this ruling of the district court.

A.

Plaintiff sought back pay for his Title VII salary discrimination claim from the Board of Regents, its former Chancellor Roy S. Nicks, and TSU. He sought reinstatement and damages for his § 1983 retaliatory discharge claim against Board of Regent's Chancellor Thomas Garland, TSU President Otis L. Floyd, and TSU Vice President George W. Cox.

The district court ruled prior to trial that plaintiff's salary discrimination claim was restricted to the period from January 9, 1985 until June 30, 1987, the date of his removal as dean, since any Title VII claims prior to January 9, 1985 were barred by the statute of limiations. The court also held that Chancellor Nicks could be sued only in his official capacity under Title VII.

The court also held that the individual defendants, Garland, Floyd and Cox, were entitled to qualified immunity to civil

damages on plaintiff's § 1983 retaliatory discharge claim because public officials could have resonably disagreed on whether plaintiff's public statements were protected by the first amendment. The court noted, however, that since plaintiff sought injunctive relief by way of reinstatement, the § 1983 retaliatory discharge claim against the individual defendants remained.

Following a bench trial, the district court dismissed both of plaintiff's claims. The court found that plaintiff failed to prove that defendants' stated reasons for paying plaintiff a salary lower than was being paid to engineering deans at MSU and Tech were pretextual. The court also found that TSU's interest in fulfilling its educational mission outweighed plaintiff's free speech interest and, in any case, that plaintiff would have been terminated even absent his protected speech since the proofs established that plaintiff engaged in an ongoing pattern of abusive and insubordinate

behavior warranting removal from the deanship. This appeal followed.

II.

The shifting burdens of proof in a Title VII disparate treatement case require that the plaintiff must first prove by a preponderance of the evidence that a prima facie case of discrimination exists. The burden then shifts to the defendant to articulate some legitimate, nondiscriminatory reason for its actions. The plaintiff must then prove by a preponderance of the evidence that the nondiscriminatory reason offered by the defendant for its action was not the true reason but a mere pretext. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981).

Plaintiff contends that the district court erred in finding that plaintiff failed to prove, at step three of the process, that the nondiscriminatory reasons articulated by defendants were pretextual.

At trial, the facts established that for academic year 1984-1985 plaintiff received a salary of $58,838 while the engineering deans at MSU and Tech received salaries of $59,920 and $61,212, respectively. In 1985-1986, plaintiff received $62,638, the MSU engineering dean received $64,000 and the Tech engineering dean received $64,884. In 1986-1987, plaintiff received $65,487, the MSU engineering dean received $69,000 and the Tech engineering dean received $68,496. The TSU president's salary in 1984-85 was $59,000; in 1985-86 it was $65,000, and in 1986-87 it was $68,300.

Defendants produced evidence showing that salary recommendations for university personnel came from the universities themselves and were approved by the Board of Regents, and that there was no attempt to make the salaries uniform among the universities under the Board's control. The only salary set by the Board was the salary of the university presidents. The policy,

according to the defendants, was that the president's salary was based on the size and complexity of the university he served, and operated as a cap on all other salaries paid to personnel of that institution except the salaries of the deans of the medical or law schools. In turn, the salaries of the deans depended on the size and complexity of their department and the financial resources of the university.

Plaintiff contends that the Board repeatedly rejected TSU president's recommendations for salary increases for plaintiff, despite the fact that TSU had sufficient financial resources. The facts established that due to TSU's chronic overstaffing problems, the pool of funds from which salaries could be drawn was small. In the 1984-85 academic year, the TSU president recommended a salary increase for plaintiff that exceeded the salary the Board set for the TSU president and, therefore, the Board of Regents, at the TSU president's request,

rejected the recommendation. In 1985-86, the TSU president, upon his departure from the university, made a belated recommendation to the Board to increase plaintiff's salary. The Board referred the proposed increase to TSU's new interim president for review, but no recommendation was ever resubmitted to the Board. In 1986-87, the recommended increase in plaintiffs salary was approved by the Board.

Plaintiff contend, contrary to the defendant's claim, that the president's salary did not operate as a cap on the dean's salary since the deans of engineering at MSU and Tech made more than the president of TSU. However, the proofs show that the deans at MSU and Tech were not paid more than the presidents of their respective schools except that in 1986-87, Tech's dean of engineering made $200 more than Tech's president. The district court found the salary differential resonable since Tech had an interim president at the time. Plaintiff points out that TSU

had an interim president from 1985 through 1987. We note, however, that it was academic year 1984-85 that plaintiff's salary increase was rejected because it exceeded the salary of the TSU president. Thus, the defendant's evidence that a president's salary operated as a cap upon a dean's salary was not refuted by plaintiff.

Plaintiff also contends that the size and complexity of the engineering programs at the three universities did not affect the dean of engineering's salary since MSU's dean of engineering was paid more in 1986-87 than the engineering dean at Tech although Tech had the largest engineering program. The district court found that salaries were drawn from the revenues generated and that the MSU dean was paid more because there was a larger pool of funds available that year for salaries at MSU due to increase enrollment

Plaintiff also contends that the size and complexity of the engineering program were irrelevant since associate dean of

engineering salaries at the universities were not determined according to those criteria. The district court found that the salaries of the associate deans could not be compared since their job descriptions varied from university to university.

In sum, the district court found that plaintiff failed to prove that defendants' nondiscriminatory reasons for plaintiff's lower salary were a mere pretext. The court noted, in addition, that plaintiff was the highest paid administrator at TSU while the same could not be said for his counterparts at MSU and Tech.

We conclude that the district court's finding that plaintiff failed to prove that defendants' nondiscriminatory reasons for the salary differences among the engineering deans at MSU, TSU and Tech were mere pretext is well supported in the evidence and is not therefore, clearly erroneous. Therefore, we shall affirm the judgment for defendants on plaintiff's

Title VII salary discrimination claim.

III.

When a public employee alleges retaliation for the exercise of his constitutional right to free speech, the court must determine, first, whether the employee's comments address matters of public concern, Connick v. Myers, 461 U.S. 138, 145 (1983). If so, then the court must balance the employee's interest to speak against the employer's interest in promoting the efficient performance of its public service, Pickering v. Board of Education, 391 U.S. 563, 568 (1968). Then the employee must show that the protected comments were a substantial or motivating factor in his discharge, while the employer has the opportunity to show by a preponderance of the evidence that it would have discharged the employee even absent the protected speech, Mt Heathy City Board of Eduction, 429 U.S. 274, 287 (1977).

The specific questions before us regarding plaintiff's retaliatory discharge claim

are 1) whether the district court erred in finding the Pickering balancing test weighed in defendants favor, and 2) whether the district court erred in finding that under the Mt Heathy causation test, the defendant established that plaintiff would have been terminated even absent the protected conduct.

The Pickering balancing test requires that a plaintiff's comments be considered in the context in which they were spoken. Connick, 461 U.S. at 152-53. Comments which adversely affect close working relationships or disrupt the maintenance of discipline or cause disharmony among coworkers may tip the balance in a defendant's favor. Anderson v. Evans, 660 F.2d 153, 158 (6th Cir. 1981).

The record shows that Dr. Isibor was outspoken on many matters, including allegations of misappropriation of funds from a General Electric grant given to TSU's School of Engineering and a one million dollar investment made by TSU through an investment

firm that went bankrupt. However, plaintiff's comments failed to exposed any wrongdoing, and indeed were made after the facts were already publicly disclosed. Plaintiff's comments on the misappropriation of grant funds came after a full investigation revealed that plaintiff's unauthorized conduct in misdirecting some of the funds to TSU Foundation, an unauthorized recipient, was the principal cause of the misappropriation. Similarly, plaintiff's comments on the one million dollar investment loss, including a radio talk show comment that a university budget department employee had misappropriated or stolen the money, came after the investment was already fully recovered.

The district court found, with ample support in the record, that plaintiff' comments were made to discredit those he felt were plotting against him. He repeatedly made reckless accusations and baseless attacks on fellow administrators. His comments were not supported by facts but reflected instead his

refusal to accept the answers given to him by TSU administrators to his inquiries. We find no error in the district court's conclusions that plaintiff's comments interfered with the efficient functioning of TSU and that defendants' interest in fulfilling its educational mission outweighed plaintiff's free speech interest. Pickering, supra.

In any case, the district court was justified in concluding that defendant's proved by a preponderance of the evidence that plaintiff would have been removed as dean even if his public statements had not been made. Mt Heathy City Board of Education v. Doyle, 429 U.S. 274, 287 (1977). There was overwhelming proof of plaintiff's insubordinate and abusive behavior toward his supervisors, fellow faculty members and employees at TSU. Therefore, we shall affirm the judgment of dismissal of plaintiff's free speech retaliatory discharge claim.

IV.

Plaintiff also contends that the trial judge erred in failing to recuse himself under 28 U.S.C. § 455(a).[2] Plaintiff asserts that the district judge could not objectively weigh the evidence in the case since he believed plaintiff's witnesses were members of a faction who opposed the judge's order in an earlier case desegregating traditionally black TSU.

28 U.S.C. § 455(a) requires a judge disqualify himself when his impartiality may reasonably be questioned. The statute states:

> Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned. 28 U.S.C. §(a).

---

[2] Plaintiff concedes that 28 U.S.C. § 455(a) is his only avenue for challenging the denial of his motion for recusal since plaintiff failed to file a party affidavit as required by 28 U.S.C. § 144.

The test is an objective one and asks whether a reasonable person, knowing the surrounding circumstances, would consider the judge impartial. United States v Norton, 700 F 2d 1072, 1076 (6th Cir. 1983), cert. denied, 461 U.S. 910 (1985). The bias must stem from an extrajudicial source rather than from participation in judicial proceedings. Demjanjuk v. Petrovsky, 776 F.2d 571, 577 (6th Cir. 1985), cert. denied, 475 U.S. 1016 (1986). "Impressions based on information gained in the proceedings are not grounds for disqualification in the absence of persuasive bias." In re Khan, P.S.C., 751 F.2d 162, 164 (6th Cir. 1984) (quoting United States v. Porter, 701 F.2d 1158, 1166 (6th Cir. 1983), cert.denied, 464 U.S. 1007 (1983)). A district court's decision not to recuse itself will be upheld absent an abuse of discretion. In re Khan, P.S.C., 751 F.2d 162, 165 (6th Cir. 1984); Johnson v. Trueblood, 629 F.2d 287, 290 (3rd Cir. 1980), cert. denied, 450 U.S. 999 (1981).

Plaintiff's recusal request was made after certain plaintiff witnesses testified about the racial change in TSU following the court's decision in Geier v. Alexander, 593 F. Supp. 1263 (M.D. Tenn. 1984), aff'd, 801 f.2d 799 (6th Cir. 1986), wherein the court approved a consent decree that included affirmative action provisions to aid in the desegregation of traditionally black TSU. Two of plaintiff's witnesses testified that they were opposed to the integration of TSU.

In response to plaintiff's recusal motion, the court reassured plaintiff that his claims would be decided based on the proofs presented. The court thought it possible that the underlying controversy in this case arose from the opposition to TSU's integration but did not believe such an issue was presented by the proofs. Plaintiff cites noting in the record to suggest that the court thought the underlying issue was one of desegregation, or that its prior desegregation order in any way affected its conclusion in

this case, and no such inference can reasonably be drawn from the court's opinion.

We conclude the district court did not abuse its discretion in denying the motion to recuse itself.

V.

Finally, plaintiff argues that the court erred in granting the individual defendants, Garland, Floyd and Cox, qualified immunity from civil damages on the retaliatory discharge claim because "public officials could resonably have disagreed over whether plaintiff's 'expressions of concern' were protected by the First Amendment."

Prior to trial, the court granted qualified immunity to Garland, Floyd and Cox for civil damages arising from plaintiff's free speech retaliatory discharge claim but held that the claim remained viable since plaintiff also requested he be reinstated as dean. Since we upheld the district court's finding that the individual defendants did not remove plaintiff as dean due to plaintiff's

exercise of his first amendment right and since plaintiff's request for civil damages arises from the same claim, we need not address this issue.

However, based upon the nature of plaintiff's comments as discussed in II infra, we conclude that reasonably competent officials could have disagreed on whether and to what extend plaintiff's comments were protected by the first amendment. Garvie v. Jackson, 845 F.2d 647, 650 (6th Cir. 1988). Moreover, contrary to plaintiff's assertion, whether qualified immunity attaches is a question of law to be decided by the trial court before trial. Id. at 649. Thus, the trial court correctly decided the issue of qualified immunity prior to trial.

For the reasons set forth above, we AFFIRM the judgment of the district court dismissing plaintiff's claims.

APPENDIX B.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

EDWARD I. ISIBOR,

Plaintiff,

CIVIL CASE NO. 3-87-0669

October 6, 1988
Nashville,

v.

BOARD OF REGENTS OF THE
STATE UNIVERSITY AND
COMMUNITY COLLEGE SYSTEM
OF THE STATE OF TENNESSEE,
et al.,

Defendants.

TRANSCRIPT OF RULING
BEFORE THE HONORABLE THOMAS A. WISEMAN, JR.

APPERANCES,

For the Plaintiff: Cyrus L. Booker, Esq.
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Also: Linda A. Ross

Official Court Reporter: John W. Tummel, RPR
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Nashville, Tn. 37203

THE COURT: All right. First, as to the Title 7 claim.

Plaintiff alleges that he was paid less than his counterparts at Memphis State and Tennessee Tech on account of his race or national origin. This presents a disparate treatment claim. It's controlled by the McDonnel-Douglas case and the Burdine case.

Plaintiff bears the burden of proof that he was the victim of intentional discrimination.

As you pointed out, Mr. Booker, there is no dispute as to the essential elements of a prima facie case.

Upon the presentation of a prima facie case, the defendant must articulate legitimate nondiscriminatory reasons for its action. Once articulated, the burden of going forward shifts back to the plaintiff to show by a preponderance of the evidence that the proffered reasons are pretextual.

The defendants' articulated reason, one reason articulated by the defendants, is that

the engineering program at Tennessee State is smaller, less complex than those at Tennessee Tech and Memphis State. The proof bears this out.

The TSU engineering major full-time equivalent is approximately half that of Memphis State, and roughly a third that of Tennessee Tech Engineering degrees, Tennessee State is approximately one-fourth of Memphis State and one-fifth that of Tennessee Tech.

Engineering faculty, less than half of either of the other two counterparts.

Dr. Nicks' testimony was that this was a factor in the calculus. The plaintiff's evidence to demonstrate that this was pretextual was that although the engineering program at Tennessee Tech was the largest, the Memphis State dean's salary in at least one year was higher.

The response to that, of course, by Mr. Vaden was that because of changing enrollments and the fact that fee revenues were allowed

to be setting salaries, there was a larger pool of funds available for salaries at Memphis State than at TSU. This is a logical explanation.

Of course, the differences in the programs are not reflected across the board. The associate dean at Tennessee State earned more than the associate dean at Memphis State for all these years.

Mr. Vaden's response to that, that such a variance is not surprising in that job descriptions differ from school to school.

To sum it up, the defendants have demonstrated that the general pattern of paying a TSU dean less is not an indicator of any bad faith on their part. Rather, given the relative sizes of the schools and the size and complexity of the respective programs, the differences are quite understandable.

And there is the further element in this respect that there was a serious overstaffing problem at Tennessee State which

made for a smaller pool from which salaries could be paid. Well, in short, it appears that Tennessee State was being funded at an even higher rate per full-time equivalent student than other universities in the Board of Regent system. But they were overstaffed with both faculty and staff, and this resulted in a smaller pool from which salaries could be paid.

A second articulated reason by the defendants is that the general policy throughout the Regent schools is that the dean's salary should not exceed the president's salary. There are three exceptions to this, of course, law deans, medicine deans, and one year, the engineering dean at Tennessee Tech.

Of course, the market place determines the price that must be paid for the dean of the law school, the dean of the medical school, and the explanation of the other exception, that is that the one year at Tennessee Tech was that there was an interim president, and

this, the Court finds to be reasonable.

The additional articulated reason by the defendants is that the $1,084 of increase recommended for the year 1985-86 was not approved because it was withdrawn upon subsequent review by President Peterson. This is supported by Chancellor Nicks' testimony, Mr. Vaden's testimony, and the testimony of former President Humphries, also testifying that the equity adjustment was submitted as he walked out the door, almost as an afterthought.

The fact that Board re-referred this for the recommendation of Interim President Peterson and Interim President Peterson's review and not recommending it is not pretextual but has merit. He did it along with four others and there is no evidence it was done for an improper motive.

On the Title 7 claim, the Court finds that the plaintiff has failed to carry the burden of persuasion that the articulated reasons of the defendants were pretextual.

Therefore, Title 7 claim will be dismissed.

The Court also denies the motion to amend the Title 7 claim to include the extra service pay request.

Now, on the termination as dean. Here, the plaintiff alleges that he was terminated as dean in retaliation for exercising his First Amendment right of free speech.

Now, the damage claims, of course, were dismissed earlier in the motion for summary judgment on the grounds of qualified immunity. So the only claim before the Court now is the one for reinstatement.

The general approach and the role of this Court is spelled out in the case of Anderson versus Evans, a Sixth Circuit case found in 660 Federal Second. There, the Court said, the role of Federal Courts in actions by teachers and other public employees against their state and local employers is a limited one. The sole function of the Federal Court in such litigation is to provide remedial action where constitutional violations by

public employers are established.

Thus, of course, the role is not to look over the shoulders of Tennessee State University officials to determine whether their decision to remove Dr. Isibor as dean was fair, correct, was reasonable, rather, the role is to determine whether or not the plaintiff's constitutional right of free speech has been violated, and if it has, to provide a remedy.

This is, even if a dismissal appears to some to be unfair or mistaken, that doesn't provide a basis for review of this court. The University has the right to choose its dean. Dean Isibor has no property right in being dean. He has no tenure in being dean. It's the University's decision to make unless it makes it for a constitutionally prohibited reason, that is, a violation of Dr. Isibor's First Amendment rights.

Now, in determining whether Dr. Isibor's right of free speech has been violated, the Court's analysis is guided by the Pickering

case of the United States Supreme Court, Connick case, Mount Healthy, and the Anderson versus Evans case.

There are four elements to this cause of action:

First of all, the plaintiff must demonstrate that the matters on which his speech was addressed were matters of public concern. Now, if he's successful in doing this, the next thing that must happen is that the Court must balance the interest of the plaintiff as a citizen in commenting on matters of public concern against the interest of the defendant public employer in promoting the efficiency of public services it performs through its employees.

If the plaintiff's interest outweighs the defendant's, then in that event, the plaintiff must then prove that his protected speech was a --- there must be a causation factor. He must prove that his protected speech was substantial or motivating factor in the alleged retaliatory action.

Now, the fourth element after that is that the defendant then has an opportunity to prove that it would have reached the same decision even without the protected conduct.

So, if the plaintiff failed on any one of the first three prongs, that is, public concern, the balance test and that is was --- there was a casual relationship, if he fails on any one of those three, he loses.

If the defendant prevails by a preponderance of the evidence on the fourth factor, that is, that they would have done it anyhow, regardless of this, then the plaintiff also loses.

Well, looking first at the first element, that is, whether or not the speech involved public concern. This must be determined by looking at the content of the speech, the form of the speech, the context of the statements in which the statements were made as revealed by the whole record before the Court.

Now, this whole record before the Court reveals that Dr. Isibor was, in fact, outspoken

on many matters, some of which, at least in part, were matters of public concern. On the million dollar investment, the testimony of Dr. Isibor, Greg Carr, Elizabeth Wayte, Mr. Ronnie Smith indicated that money problems at TSU were so bad that teachers could not even get chalk according to them. There's other testimony, of course, that nobody ever asked for chalk. I credit the testimony that there were money problems.

And while this was going on, the million dollar investment problem come to light. At least at that time, concerns about the investment were public concerns. They were addressed to management of public funds which at least arguably directly affected the State's ability to educate the young adults.

On the conflict of interest problems, questioning the objectivity of persons moved into the financial affairs office from the Board of Regents and from the State Comptroller's office. In light of Tennessee State's history of financial problems, it

may have been reasonable for Dr. Isibor to be concerned about whether the new persons would be held properly accountable for their activities.

Again, Ms. Wayte testified that when she expressed concern about apparent irregularities in computer purchases to Mr. Greathouse, that Mr. Greathouse said that he would go to the wall for the financial officer who was ultimately responsible, that is, Mr. Dickson. Without regard to-- I held that to be hearsay, but I'm taking it into consideration; because she relayed that to Dr. Isibor, I'm taking it into consideration in terms of his state of mind.

On the hiring practices at Tennessee State, the conflict of interest problems noted in the previous statements, concern about the advertising, the potential patronage issue involved in the athletic director hiring, vice-president of academic affairs, letter from the Rainbow Coalition, testimony of Mr. Ronnie Smith might fairly be

characterized as matters of public concern.

However, ruling that Dr. Isibor's speech, at least in part, addressed matters of public concern in no way is the Court ruling that Dr. Isibor's allegations are true. It's a very generous characterization in some of the instances to say they were matters of public concern. In many instances, his outspokenness merely expressed what I would call an employee beef, a belief that the people above him who were making certain decisions which affected him were incompetent.

Dr. Isibor often took his beef one step further, he charged not only that they were incompetent, the people with whom he disagreed, but he accused them of being dishonest, particularly I refer to Exhibit 102, the letter to Ms. Wilkison which was libelous, to say the least.

The court specifically does not credit the truth of these allegations. Not only has anyone failed to prove or produce any

evidence of dishonesty on the part of anybody there, but also, Dr. Isibor resorted to the same tatics in this courtroom that anybody who disagreed with is view of the testimony, he said they were lying or it was an outright falsehood, or implied that they were dishonest.

Dr. Isibor's charges that persons were incompetent or dishonest do not appear from the record to address the issues of public concern.

On the other hand, it is difficult to parse those statements that were of public concern from those that were not.

So the Court will proceed to the balancing test. In here, the Court must look to a particularized balance, to look at the whole record, including the context, the time, the place, the manner of the statements that were made and the effect or the perceived effect that the statements would have on the University's ability to fulfill its educational mission.

In Exhibit 102, for instance, the letter to Ms. Wilkison, Dr. Isibor accused the University administration of illegal hiring practices that remind, quote, one of some type of criminal network is designed to usurp the control of the financial resources of the University. He further insinuated that Ms. Wilkison and the administration were dishonest. He said in the same letter, I hope you and your friends will also be reminded that you should not be members of any scheme designed to siphon taxpapers' funds entrusted to our State institutions into the pockets of some unscrupulous individuals who have no integrity. The State already has enough people in prison. Those who have not been caught yet should change their ways and not continue to press their luck.

This wholly irresponsible letter has absolutely no basis in fact. It was written, as suggested by Mr. Himmelreich, the best

defense is a good offense. It was written at the time that his overexpenditure of the GE grant had been criticized.

He continued to ask questions concerning the GE grant that a Ph.D. should have known better than to ask. For instance, he continually asked where the money came from. And who authorized the overexpenditure. It appears to the Court that the overexpenditure resulted from requistions originating in the office of Dr. Isibor himself.

Any knowledge of accounting principles would answer the question of where the money came from. There was an account receivable, the GE grant against which requisitions could be made. There was no separate port for this or any other account on the books of the University. The receivable on the books at TSU and against which the requisitions were made were paid from cash flow but the receivable never came in because Dr. Isibor accomplished diversion of the receivable from TSU to the TSU Foundation.

Dr. Isibor made requisitions and expenditures then against both of them. He well knew the answer to the question he continued to ask or he should have known the answer because he caused the problem himself.

Indeed, Dr. Isibor's continual questions and accusations appeared to have been designed simply to undermine the credibility of the million dollar investment also reflect both an obdurate refusal to look at facts presented to him and an attack again on the offense upon the integrity of Mr. Ron Dickson, a person whose appointment Dr. Isibor used as an example of conflict of interest hiring problem.

Testimony of Mr. Garland, Ron Dickson, Dr. Floyd indicates that problems had been fully explained and that steps were taken to prevent future recurrence, and that the money had been or was about to be recovered, eventually was fully recovered.

Dr. Isibor's questions about reallocation of funds away from engineering building,

although Dr. Isibor insisted that Ron Dickson, quote, diverted the money from the project, Carl Norman Johnson's affidavit clearly indicates that no money was diverted, rather, the engineering school received almost $200,000 more money for equipment authorized by the Building Commission than they were originally slated to receive.

To recap thus far, Dr. Isibor's comments may have touched upon matters of public concern insofar as they were related to management of public funds and preserving the systemic integrity of the State education system. However, the record demonstrates first, Dr. Isibor persisted in dogging issues with little regard for the answers he received or for the facts. He pursued stale issues and ignored the facts.

2. Dr. Isibor's comments were often made as aggressive responses to criticisms of him.

3. Dr. Isibor made persistent and unfounded attacks on the personal integrity

of employees with whom he had to deal on a regular, daily basis. Dr. Isibor's comments undercut the level of trust between his school of engineering and other parts of the University administration.

For instance, Mr. Dickson testified his office had greater difficulty dealing with other parts of the University because Dr. Isibor had reduced the level of trust persons had in the financial affairs office.

Dr. Cox testified that Dr. Isibor would not meet with him without a witness or a tape recorder.

These factors together suggest that even if Dr. Isibor were dismissed for speaking out, TSU's interest in efficiently fulfilling its education mission outweighed Dr. Isibor's interest in making such statements, irresponsible as they were.

Another factor weighing in favor of the University. There was a change in administration, both the chancellor and the president. Dr. Floyd, Mr. Garland testified

to their concerns about image problems at TSU, their desire to improve the image of the University and the quality of education at the University, to achieve the goals that they had they need personnel who demonstrate loyalty and willingness to cooperate with their plans. This is especially so with high level administrators who set policies and often speak on behalf of the school. This is their right.

Testimony indicates that Dr. Cox was fully aware of Dr. Isibor's history of impugning integrity of the person with whom he disagreed and of his unwillingness to cooperate with his superiors.

For instance, you would note the criticism of Dr. Peterson that he was footdragging on the part of Dr. Isibor in efforts to develop joint programs and, of course, the problems with Dr. Cox.

Also in light of Dr. Isibor's accusations against persons in his letter to Dr. Floyd, although wishing Dr. Floyd success under

certain conditions, was not necessarily reassuring to Dr. Floyd.

Thus, as new leadership came on board, there was an interest in putting together a successful team of administrators. This weighed heavily in favor of TSU in the Pickering balance.

Finally, the third element and that is on causation. On the basis of the above, It is apparent that the plaintiff's constitutional rights of free speech was not infringed by his termination. Tennessee State's interest in officially fulfilling its educational mission outweighed Dr. Isibor's interest in speaking out.

Alternatively, even if the balance came out differently, the termination was justified.

Finally, the defendant had satisfied the Court that the plaintiff would have been terminated, perhaps should have been terminated even absent his protected conduct.

The rationale for this kind of decisions

is spelled out in Mount Healthy, the Supreme Court decision which held as follows:

> A rule of causation which focuses solely on whether protected conduct played a substantial or otherwise part in a decision not to rehire could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing.
>
> The difficulty with such a rule is that it would require reinstatement in cases where a dramatic and perhaps abrasive incident is inevitably on the minds of those responsible for the decision to rehire and does, indeed, play a part in that decision. Even if the same decision would have been reached had the incident not occurred. The constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse position than if he had not engaged in the conduct.

A borderline or marginal candidate should not have the employment question

resolved against him because of constutionally protected conduct, but that same candidate ought not to be able by engaging in such conduct to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record simply because a protected conduct makes the employer more certain of the correctness of its decision.

The proof in this case demonstrates that although Dr. Isibor had a knack for public relations when it came to touting his notable achievements at the school of engineering, he had serious difficulties in getting along with people. He had serious people problems. The testimony of witnesses who were sympathetic to Dr. Isibor repeatedly described him as a perfectionist who expected high standards of others, perfectionist or not, the proof demonstrates that he abused many of his employees, calling them stupid, shouting at them, shaking his finger in their faces, generally treating them in a disrespectful

manner.

These were not isolated instances of the loss of temper, but rather it comes through loud and clear to this Court from many witnesses that this was his normal court of conduct. This conduct might reasonably be considered by man, including the Court, to be intemperate, overbearing an inconsiderate.

The Court has observed the manner and demeanor of the many witnesses, although the Court acknowledges and credits the testimony of witnesses who stated that they did not think that Dr. Isibor mistreated his employees, it also credits the accounts of the various instances of mistreatment which were related; specifically the testimony of Ms. Della Bradley, Ms. Evelyn Hadley, Mr. Vincent Mitchell, Ms. Cynthia Waller and Ms. Betty Washington.

Toward the faculty of the school of engineering, Dr. Isibor's approach was demeaning, bullying and unprofessional. Here, the Court credits the testimony of Associate Dean

Malkani, Dr. Clark, both called as witnesses by the plaintiff himself, as well as the testimony of Mr. Vincent Mitchell, Mr. Walter Vincent, and Mr. Maxwell Haley.

Toward his superiors in the University administration, Dr. Isibor's attitude and conduct was insubordinate and unprofessional. As noted earlier, his response to any criticism was to go on the attack and attempt to intimidate. Even former President Humphries, who tried to be as favorable to to Dr. Isibor as he honestly could be, said Dr. Isibor came across brashly in his choice of words.

The incident with President Peterson in the cafeteria was wholly inappropriate and would have constitute gounds for discharge for insubordination if President Peterson had been other -- anything other than an interim president.

Dr. Isibor's conduct toward his superiors Dr. Crowell, Dr. Cox. and Dr. Burger, when these persons were vice-presidents for

academic affairs, and his refusal to attend Dean's Council meetings indicated a belief that he was untouchable and above the normal rule of conduct reasonably expected of a dean, a faculty member, or any other person in public or private employ.

Here, the Court credits the testimony of Dr. Peterson, Dr. George Cox, Ms. Jewel Brazleton, Mr. Ron Dickson, Dr. Otis Floyd, and Dr. Roberts. This is further demonstrated by the unfounded accusations and letters noted earlier.

It is apparent from this pattern of behavior that this was also in Dr. Cox's mind when he recommended removal of Dr. Isibor as Dean. Evidence is strong enough to convince this Court that even if Dr. Isibor had not been outspoken on matters of public concern, he would have been terminated as dean.

Now, then, as to the extra service pay claim. Dr. Isibor alleges that he was denied payment of an extra service pay request.

Now, first as to prong one. Was

protected conduct a substantial or motivating factor in the denial? Note here the plaintiff bears the burden of proof. The burden of persuasion, the risk of non-persuasions rests upon the plaintiff.

Plaintiff's evidence here through the testimony of Dr. Isibor, Dr. Clark, Dr. Cox. Dr. Vincent and Dr. Floyd. In Exhibit 12 and 43, the plaintiff has shown that he was twice paid for work performed. The first payment was recommended October 1st, 1986 by Dr. Cox; the second was paid on February 13, 1987.

The first payment was for work done under the original grant in which Dr. Isibor was not named. The second was for work done under the renewal grant in which he was named.

He was not paid for his third request, Although Dr. Cox testified that the request submitted under EI International alterted him to a potential problem because he thought it was the plaintiff's company. Exhibit 43 shows that the second payment request was also submitted by EI International, as well, but

payment was made.

Also, Dr. Isibor had been told -- had been told by the principal investigators to submit the third request in that fashion.

Now, Exhibit 13, 14, 15, 17, 31, and the testimony of Dr. Cox, Dr. Clark, Dr. Isibor, Dr. Risby indicate that the procedural error was remedied and that Dr. Cox took the third request under consideration but denied the claim in August 1987, after Dr. Isibor had been terminated as dean. This is the plaintiff's proof.

Now, from this, the plaintiff wishes us to infer from the timing of this denial that this departure from the past conduct of two previous payments that the defendants acted in bad faith or to retaliate against Dr. Isibor for speaking out.

We turn now, then, to the defendants' evidence and looking to the whole of the evidence on the question of whether or not the plaintiff has carried the burden of showing the causation factor.

The concern of everyone in this matter comes through about a dean whose responsibility includes supervising grant work, that same dean performing work on a grant under -- himself under the supervisions of persons that he normally supervises. This was plainly expressed by Dr. Cox, by Dr. Floyd and by Dr. Risby, and was suggested in a letter from Susan Short Jones to Henry Haile, borne out by the testimonies of Dr. Clark and Dr. Vincent. Both of them testified that Dr. Isibor worked on the grant because he told them he would, not because he had any special expertise or because they needed him.

Dr. Clark said he wasn't put on because he was needed, he was put on because he said he was going to be on. He was put on because he was the boss because he wanted a piece of the action. That rang true to the Court and the Court looked at Dr. Clark as she said that. I believed her.

In this regard, the testimony of Dr. Clark and Dr. Vincent is more credible, Dr.

Vincent, than documents entered in which they requested payment for Dr. Isibor. Both Dr. Clark and Dr. Vincent testified they were urged by their dean to include him and to get him paid.

Of course, Dr. Clark and Dr. Vincent felt pressure and this is especially cogent in light of all the testimony about how other employees were treated by Dr. Isibor.

Through the testimony of Dr. Risby and Dr. Clark before the denial of the third request, the defendants had indicated a concern about a conflict between paying Dr. Isibor for consulting work on this grant and the principles outlined in the OMB circular 821., Exhibit 67. This reads, quote, since intra-University consulting is assumed to be undertaken as a University obligation requiring no compensation in addition to full-time base salary, only in unusual cases where consultation is across departmental lines or involves a separate or remote operation and the work performed by the

consultant is in addition to his regular department load, extra pay is allowable, providing that such consulting arrangments are specifically provided for in the agreement or approved in writing by the sponsoring agency.

Now, of course, this concern is not expressed until Dr. Risby's memo but before the request was denied. Plaintiff, of course, suggests that this timing demonstrates a pretext.

In the meantime, of course, there had been a change of administration. Dr. Floyd became interim president duly appointed, subsequently became president. This progression occurred during the sequence of decisions on this issue. General concern about the use of research grant funds was extant, Dr. Risby was charged with tightening up procedures, these procedures were being tightened up generally and gradually. Specific concern was expressed about payment to Dr. Isibor early in the sequence. The

conflict problems were instigated to some extent as the first payment was made, but Dr. Isibor had taken a leave of absence and nevertheless, Dr. Cox, Dr. Floyd and Dr. Risby all testified that they were concerned about the problems inherent in Dr. Isibor receiving payment under this grant. They also testified that they expressed these concerns to each other, to the principal investigators themselves, and to Dr. Isibor, suggesting that it shouldn't be done again at one point.

As Dr. Floyd settled in and as Dr. Risby fulfilled his task and tightened up the procedures, the administration made a legitimate decision to break away from pass practice of paying Dr. Isibor on the grant, not because of his outspokenness, but because he finally concluded that the payments were improper.

Whether or not the payments were improper, this Court is not called upon to decide. This Court is called upon to decide whether or not

the refusal to pay, the denial of the payment was motivated by a constitutionally prohibitive reason. In this respect, the Court denies the motion to amend to allege a pendent State claim. It declines pendent jurisdiction in this case. There are Eleventh Amendment problems and other matters involved in that that this Court does not see the need to get into when it is properly a matter that could be considered by another Court.

For all the foregoing reasons, the Court finds that all the plaintiff's claims are without merit, dismisses them all and grants judgment to the defendant with its reasonable costs.

Case will be dismissed. Court will be in recess.

APPENDIX C.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE,
NASHVILLE DIVISION

EDWARD I. ISIBOR	)	
	)	
v.	)	NO. 3-87-0669
	)	
THE BOARD OF REGENTS OF THE STATE UNIVERSITY AND COMMUNITY COLLEGE SYSTEM OF THE STATE OF TENNESSEE, et al.	)	

ORDER

Upon consideration of the complaint, the responses thereto and the entire file, the Court finds the orders:

1. Defendant, Roy S. Nicks, is dismissed as a defendant in his individual capacity. He shall remain a defendant in his official capacity.

2. Defendants have moved for summary judgment in favor of the Board of Regents on plaintiff's salary discrimination claim under Title VII. The motion is denied.

3. Defendants have also moved to dismiss and/or for summary judgment in favor of

defendants Thomas Garland, Otis L. Floyd, Jr. and George W. Cox on several grounds. The portion of their motion which asserts that defendants Garland, Floyd and Cox are entitled to qualified immunity from civil damages under 42 U.S.C § 1983 is granted. Because plaintiff also seeks injunctive relief, however, Messrs. Garland, Floyd and Cox shall remain as defendants to plaintiff's second cause of action.

4. The portion of defendants' motion for summary judgment asserting that plaintiff's dismissal as Dean did not deprive him of a constitutionally-protected liberty or property interest is granted.

5. Because there is no genuine issue of material fact as to whether defendant Garland was personally involved in refusing plaintiff's extra service pay request, he is entitled to summary judgment on that issue. Accordingly, he is dismissed as a defendant to plaintiff's third cause of action.

6. The remaining portions of defendants'

motions to dismiss and/or for summary judgment are denied.

The accompany Memorandum sets forth the Court's reasons for the above findings and orders. Furthermore, this Order and the Pretrial Order filed June 15, 1988, have rendered moot the remaining pending motions. Accordingly, they are denied.

THOMAS A. WISEMAN, JR.
CHIEF JUDGE

APPENDIX D

TSU SCHOOL OF

ENGINEERING AND TECHNOLOGY

TENNESSEE STATE UNIVERSITY

3500 JOHN A. MERRITT BLVD.

NASHVILLE, TN. 37203

AUGUST 14, 1984

OFFICE OF THE DEAN

Dr. Roy Nicks, Chancellor

State Board of Regents System

Murfreesboro Road

Nashville, Tennessee 37217

Dear Chancellor Nicks:

This letter is to share with you some rumors that I have heard regarding your involvement with other individuals in a continuous effort to harass me and members of my staff. It has been said that you and your staff have worked through various individuals (faculty, administrators, students) at TSU and former UTN in a constant attempt to generate discord within my administration at the TSU School of Engineering and Technology.

These rumors have been partially reinforced by statements from Mr. Jessie McDonald, a former inmate at the Tennessee State Prison, who is presently enrolled as a student in the Dept. of Civil Engineering. In a discussion with me several months ago in my office, Mr. McDonald informed me that he had been hired by some top officials in higher education to harass me by filing a continuous stream of lawsuits against me. Mr. McDonald also informed me at this meeting, and in the presence of another individual, that a member of your staff, had contacted him to generate some derogatory situations against a member of our faculty and Head of the Department of Civil Engineering, so as to deny his confirmation as a tenured member of our faculty. Mr. McDonald stated that he had refused to do this because he considered such actions to be improper. At a subsequent meeting, Mr. McDonald informed me

that these "Top Officials" were powerful enough to see that the court against me could be heard by a judge of their choice.

Dr. Nicks, it is becoming increasingly difficult for me to convince my faculty members that these are nothing but rumors and are not based on truths. I feel that a statement coming from you indicating your support of the School's administration would be very helpful to me in my efforts to quench these rumors and restore a more positive attitude among the faculty personnel.

I hope to share your response to this letter with the faculty during one of the sessions of the Faculty Institute scheduled for August 20, 1984. I would appreciate receiving your response before this date.

With kind regards.

Sincerely,

Dr. Edward I. Isibor
Dean

kl

APPENDIX E

TSU SCHOOL OF

ENGINEERING AND TECHNOLOGY

TENNESSEE STATE UNIVERSITY

3500 JOHN A. MERRITT BLVD.

NASHVILLE, TN. 37203

DECEMBER 15, 1986

OFFICE OF THE DEAN

Governor Ned McWherter

State Capitol

Nashville, Tn. 37219

Dear Governor McWherter:

On behalf of our students, faculty and staff, it gives me the greatest pleasure to congratulate you on our selection as the next Governor of the great State of Tennessee. Your victory answered the prayers of many of us here at Tennessee State University. Leaders of our Student Government Association took the unprecedented action of endorsing a candidacy. We wish you all of God's blessings as you face the task as our next leader.

I vividly recollect the day I visited your office in 1985 to have a one-to-one meeting with you and gain knowledge of your personal views of the direction Tennessee State University should be following to meet the expectations of the community as a comprehensive, urban university. I recollect that both of us ended the meeting by wishing each other good luck in our various aspirations.

Today, you have a unique opportunity to make plans for accomplishing the dreams you expressed during the campaign. You promised all Tennesseans that "The Best is Yet to Come." This goal is similar to the one I have established since my appointment as the Dean of the School of Engineering and Technology at Tennessee State University. I always preach to my students and staff to "strive to better tomorrow the best of today." With the passion for excellence that I try to project, we were indeed honored when in 1980

our School of Engineering and Technology brought the first national engineering award to the State of Tennessee. We won the prestigious Koerper Award given by the National Society of Professional Engineers. As the head of the State Legislature, you honored us by passing a resolution to commend the School for this award. I pledge to continue to work harder to improve the status of the engineering programs at Tennessee State University.

I also feel obligated as one of your friends to bring to your attention some "smoke" in higher education in the State Of Tennessee that needs to be put out before it becomes a major disaster.

In 1985, I brought to the attention of Governor Lamar Alexander and the State Board of Regents some allegations of some impropriety in the relationship between the Office of Vice President for Fiscal Affairs at Tennessee State University, the State Board of Regents Staff, and the

State Comptroller's Office. Unfortunately my call for action did not receive the attention it deserved. About two months later, an intergovernmental agency came to town to review the Office of the State Comproller and declared in its final report that the State Comptroller Office violates the conflict of interest rule in its relationship with other state agencies.

This charge of conflict of interest directly confirms the charge I made with other information some two months earlier. This situation is having a destructive impact on the operation of Tennessee State University as oneof the state institutions of higher learning. It has led campus morale to a very low ebb. This is because everyone feels powerless to do anything about this conflict-of-interest problem. The center of controversy in this regard is Mr. Ron Dickson, a former member of the staff of the State Board of Regents, who was brought to the campus with a B.S.

degree and made the Vice President for Fiscal Affairs without giving other candidates an opportunity to apply. He was also given full authority to hire new personnel without going through the regular hiring process of the University. Therefore, he chose to hire other State Board of Regents staff members and some personnel from the State Comptroller's Office. This hiring practice has created an impairment of independence in the audit report submitted annually by the State Comptroller's Office on Tennessee State University. Under Ron Dickson's Administration, Tennessee State University has lost a substantial sum of money. Yet, the annual audit report from the State Comptroller's Office and Mr. Jim Vaden of the State Board of Regents continue to praise him.

To the contrary, a review of the audit report of Tennessee State University, under his administration, will show some serious irregularities that have not been

addressed. In the 1984 Audit Report it was stated that "Tennessee State University commission for video games receipts during fiscal year 1983-84 was to be 50%, but Tennessee State University received only 15% of video game receipts.. The failure to properly monitor the contract terms has resulted in the loss of revenue to the University." Despite this finding, the University did nothing to collect the 35% that was lost from these video game receipts. Instead, the Vice President for Fiscal Affairs renewed the contract of the vendor for food service. In the following year, the audit report for the 1984-85 fiscal year reported that the "Vending machine contractors did not always remit to Tennessee State University Commissions based on the percentages stated in the contract." Again, the audit report concluded that "The University's failure to properly monitor the contract terms resulted in a loss of

revenue."

More importantly, it was brought to the attention of the general public that in August 1985, one million dollars of Tennessee State University's funds were inappropriately invested in a U.S. Treasury Note through Brittenum Associates, Inc., a Little Rock, Arkansas brokerage House. This investment, accord-to the Tennessean article of December 3, 1986,"Was not registered in Tennessee State University's name." The loss of University's funds in this manner coupled with the decline in student enrollment, has led the University to take various drastic measures to reduce personnel positions at the University. Yet, no action is being taken by the University administration or the State Board of Regents to demand accountability and to address the mismanagement of University funds by the Office of the Vice President for Fiscal Affairs.

As a taxpayer in the State of Tennessee and as an academic administrator, who takes an uncompromising stance on integrity, I have made many attempts to make my views known through the regular channels. Instead of addressing these problems, attempts have been made to harass me and keep me quiet on these issues.

Your election as our new Governor by the people of Tennessee gives me renewed hope that your administration, built on honesty and integrity, will do all it can to remove any suspicion of wrongdoing by high state officials. I strongly believe that you were elected because people feel that you are in the best position to bring honesty and integrity to the state government. I vow to stand behind you in assuring proper accountability and integrity in higher education sector of our state government.

I feel very confident that you have the potential to be the best Governor the State of Tennessee has ever had.

With best wishes.

Sincerely,

Dr. Edward I. Isibor

Dean

EII:lb

NASHVILLE BANNER

Thursday, January 9, 1986

AUDIT SAYS COMPTROLLER'S

POSTS POSE CONFLICT

BY MIKE PIGOTT

"It is a conflict of interest for State Comptroller William Snodgrass to sit on a number of state boards and commissions that are audited by his department, a team of inspectors has found.

The findings boil down to an audit of the state's auditors by experts from various Southern states.

Snodgrass said Wednesday he sees why auditors could be concerned about his service on boards, but he said his role as a watchdog on those panels should also be taken into consideration.

The findings by a team from the Southeastern Intergovernmental Audit Forum, a quasi-governmental agency, were published in an annual report of the State Department of Audit that was released

this week.

Prior quality assessments of the Tennessee Department of Audit reported that an organizational impairment of independence existed because the Comptroller of the Treasury sits on a number of state boards and commissions that are subject to audit by the Department of Audit." the team's report said.

"Our review indicated that this organizational impairment of independence still exists," the report said. "In addition, we noted that the comptroller of the treasury has administrative responsibility for the Tennessee State School Bond Authority, Local Development Authority and the Tennessee Board of Equalization Loan Fund.

"These entities are audited by the Department of Audit which is under the control of the Treasury," the report said. "We see this is an additional im-

pairment of independence."

Later in the report, the team said, "We recommend that the Comptroller of the Treasury work with the appropriate state authorities to eliminate the impairments to organizational independence."

Snodgrass, who has served as state comptroller since 1955, said he believes there is no way for any auditing organization to be completely independent.

He also said he has never tried to influence the outcome of any audit related to a board or commission on which he sits.

A copy of the audit was sent to House Speaker Ned Ray McWherter and Lt. Gov. John Wilder, who respective houses of the Legislature re-appoint the comptroller every two years.

Snodgrass said the results of the audit can be either acted upon or ignored by lawmakers.

Wilder today said, "I see no problem with him sitting on the boards, but I do

see the conflict.

"I guess if they (the auditors) say there is a conflict, we ought to take a look at it," the lieutenant governor said.

Wilder said he do not know of any occasion in which Snodgrass' membership on the boards and commissions had caused a problem."

STATE OF TENNESSEE

AUGUST 20, 1987 NED MCWHERTER

GOVERNOR

Dr. Edward I. Isibor
8220 Frontier Lane
Brentwood, Tn. 37027

Dear Dr. Isibor:

This is to acknowledge and thank you for your letter dated August 3.

I read the copy of your letter dated December 15, 1986, regarding Tennessee State University and regret that you never received a response to this letter. My Transition Office should have received it during the time between when

I was elected and sworn in as Governor. The letter was apparently misplaced and never brought to my attention.

Dr. Isibor, I assure you that as Governor, I am totally committed to doing everything I can to improve education on the TSU campus. I am dedicated to making TSU one of our top universities in the Board of Regents system.

We plan to ask for funding for capitol outlays on the campus. The request has been made that the planned building and construction projects immediately be put to contract. I plan to personally as an individual, help TSU with a commitment in the near future.

However, it is not my intent to get involved in TSU's administration and management. This is a responsibility of the Board of Regents and the Tennessee Higher Education Committee.

If you would like to meet with me to discuss these issues further, please con-

tact my Executive Assistant, Betty Haynes at 741-2001 for an appointment.

Sincerely,

Ned McWherter

/VP

APPENDIX F

EXCERPT FROM

NASHVILLE BANNER, TUESDAY, DECEMBER 12, 1989

GOVERNMENT MARKED BY SCANDALS DURING '80S

BY DONNA DAVIS

"The decade began with the Scandal of Gov. Ray Blanton's administration and concluded with a charity bingo probe and a wide-ranging federal investigation into alleged misuse of public funds by Davidson County Sheriff Fate Thomas."

"The ongoing Federal and State investigation, codenamed "Rocky Top," has uncovered evidence of bribes, fraud, conspiracy and gambling violations among lobbyists and legislators, public officials and private businesspeople."

"So far, 23 people have been indicted as part of the probe, including State Rep. Tommy Burnett, D-Jamestown, who spent 10 months in a federal prison in 1984 for failing to file income tax returns."

EXCERPT FROM

NASHVILLE BANNER TUESDAY, MARCH 6, 1990

CORRUPTION SCANDALS ARE EMBRASSING

TO TENNESSEANS

BY

M. LEE SMITH

"Rocky Top has underscored the severity of pubic corruption in Tennessee at the highest levels of state government. Revelations growing out of the problem have been an embarrassment to the State."

"In Memphis, Democratic U.S. Rep. Harold Ford is on trial on charges of bank fraud. Prior to 1983 Ford received $1.5 million in loans from banks owned by Jake and C. H. Butcher, Jr. which the government contends were, in reality, gifts to the Congressman in exchange for political favors."

Meanwhile in Nashville, Davidson County, Sheriff Fate Thomas, a powerhouse in local Democratic politics, is scheduled to go on trial July 23 on 38

separate counts of Federal racketeering. Among other allegations, using public funds to renovate his personal properties, and intermingling public money with his private business and political activities."

EXCERPTS FROM NASHVILLE BANNER

OF DEC. 14, 1989

GRAND JURY INVESTIGATES DEMOCRATIC FUND-RAISING

BY

J. PATRICK WILLARD AND DONNA DAVIS

"Three top Democrats quizzed in the Rocky Top corruption probe were soliciting political contributions from engineers and architects at the same time they held the controlling votes on the board that awarded state building contracts.

The contributions were solicited by the Tennessee Legislative Fund - a political action committee created by Secretary of State Gentry Crowell, Deputy Governor Harlan Matthews and State Comptroller William Snodgrass."

"Crowell, Matthews and Snodgrass served on the Building Commission together in the early 1980s, along with then Gov. Lamar Alexander, his Commissioner of

Finance and Administration, then House Speaker Ned McWherter and Lt. Gov. John Wilder."

APPENDIX G

EXCERPT FROM THE NASHVILLE BANNER

OF JANUARY 24, 1990

OLD PALS URGED TO AID THOMAS

Dying Lobbist's Last Words: "Help Fate"

BY

Kathleen Gallagher and Tom Gordon

"An old Nashville political network that gathered Tuesday night to remember a departed friend was urged to rally around another of their pals - beleaguered Sheriff Fate Thomas."

"The same closely knit group is tied to the federal probe of Thomas through an explanation of how Thomas may have learned he was under investigation for bribery."

"According to sources, Thomas may have learned he was under investigation for the Bellevue matter after Hooker, who was employed by Freeman-Webb as a consultant, discussed the probe with Merritt.

Freeman-Webb partner, Bill Freeman was working with federal agents. Merritt

talked to Seigenthaler, who talked to Willis, who talked to Thomas, sources said.

After the chain of discussions, Thomas wrote a letter in September 1988 opposing the shopping center project. It was hand-delivered to members of the Metro Council and the Metro Planning Commission."

Hooker

Merrill

Seigenthaler

Willis

Thomas

EXCERPT FROM NASHVILLE BANNER

HIGGINS NEXT IN LINE TO JUDGE

THOMAS CASE

BY

KATHLEEN GALLAGHER

"The trial of Sheriff Fate Thomas was to be reassigned to U.S. District Judge Thomas A. Higgins, a Republican, today after Nashville's other two federal judges - both Democratic appointees - recused themselves Monday.

Neither John Nixon nor Thomas A. Wiseman Jr., gave any written explanation for stepping aside from the case. Both had strong political ties before being appointed judges by President Jimmy Carter at the recommendation of Sen. Jim Sasser."

"Judges typically recuse themselves sua Sponte, or of their own accord, from cases involving former clients, law partners, family members or businesses in which they own an interest."

"Wiseman once ran for governor in 1974 finishing third behind Blanton and Jake Butcher for the Democratic nomination."

APPENDIX H

EXCERPT FROM THE TENNESSEAN

OF MARCH 3, 1990

TSU CAFTERIA'S TRACK RECORD

SPURS MORE INSPECTIONS

BY

SHELIA WISSNER

"The Metro Health Department plans to inspect Tennessee State University's cafeteria more often because of a multitude of health violations found during inspection this school year, an official said."

"Student protesters - who currently are on a hunger strike - complained about the cafeteria in a "manifesto" outlining deficiencies at the University they want corrected."

"The cafeteria received a score of 38 out of a possible 100 during the Sept. 9 inspection because of violations. He said a passing score is above 85."

"An inspection Feb. 1 turned up many of

the same violations again - improper food temperatures, dented cans, a broken back door, water standing on the floor, unsanitized utensils."

EXCERPT FROM THE NASHVILLE BANNER

OF FEBRUARY 21, 1990

TSU STUDENT SEIZE BUILDING

LONG LIST OF GRIPES SPURS SIT-IN

BY

KATHLEEN WILSON

"About 300 students staged a sit-in at Tennessee State University's administration building today to protest what they said is the administration's violation of their rights."

"Campus dorm conditions, better accounting for state funds and the resignations of several school officials were at the top of the students long list of complaints."

"Specifically, the students are asking for:

o. The resignation of Johnny Sheppard, Vice President of Student Affairs.

o. The resignation of Vaugh Little, Dean of Residence Life,

o. The resignation or termination of Robert Boone, an admissions official,

o. An effective and efficient shuttle bus schedule,

o. The repair and opening of all study rooms in TSU's dormitories,

o. Allocation of funds to purchase badly needed transmitters for TSU's radio station;

o. Adequate lighting on the campus and bridge so that, in Carr's word, "No one will be held up with a sawed-off shotgun";

o. An accounting of $141 million they say has been allocated to TSU;

Repair of hot water, blinking electricity, a leaking roof and a backed-up sink in Wilson Hall; non-working showers, in dormitories; and defunct elevators. Carr said he also wants an explanation of "maintenance" fees, which are the fees charged to in-state students at all state colleges, "seeing as we don't see anything being maintained."

EXCERPT FROM A COMMUNITY FORUM

ON

TENNESSEE STATE UNIVERSITY

"WHERE IS THE MONEY?"

The entire community

is invited to come out and

discuss these concerns.

Friday, March 23, 1990

7:00 p.m.

World Baptist Center

1620 Whites Creek Pk.

Nashville, Tn. 37207

CHURCH WOMEN ON COMMUNITY CONCERNS

EXCERPT FROM

THE TENNESSEAN

SATURDAY/MARCH 24, 1990

BY: CINDY ROLAND

FORUM RAISES QUESTIONS ON TSU FUNDING

Two state building officials explained a new master building plan for Tennessee State University to 150 people at a forum last night on whether TSU is adequately funded.

School administrators attending the meeting at the National Baptist World Center had little response to questions raised about whether TSU funds have been spent effectively.

Churchwomen on Community Concerns scheduled the forum to ask questions about whether TSU has received adquate state funding in the past and whether that money has been used effectively.

"Shoddy work and shoddy workmanship seems to be the common thread in the renovation of old buildings and the construction of new buildings on campuses of colleges and universities in the state of Tennessee," said Ron Smith, former president of the TSU Alumni Association.

Jerry Preston of the state's capitol pro-

jects management group, which oversees design and construction of state facilities, said he could not account for money or construction work at the campus before the state took control of new TSU projects in 1987.

I've got a knowledge that there has been some work in the past at TSU that has been shoddy," said Preston, noting that was one of the reasons his group has been asked to oversee the work.

But Smith complained that turning TSU building projects over to Preston's group for supervision by the state causes the University to lose autonomy and leave it in the state "political arena" with little control over its construction and maintenance problems.

School administrators had few immediate answers to the questions posed by the forum. Connie Nelson, Vice President for Business and Finances at TSU, invited those with questions about the school's finances to her office.

Jeff Car, President of the School's Student Government Association and leader of

the recent student sit-ins protesting building conditions on campus, said he has seen the master building plan for TSU in the past but still had questions about university funding.

APPENDIX I

STATE OF TENNESSEE

OFFICE OF THE ATTORNEY GENERAL

450 James Robertson Parkway

Nashville, Tennessee 37219-5025

HAND-DELIVERED

March 23, 1988

Mr. Cyrus Booker

Dearborn & Ewing

Attorneys at Law

One Commerce Place

Suite 1200

Nashville, Tennessee 37239

RE: Isibor v. State Board of Regents, et al. No. 30-87-0669 (M.D. Tenn.)

Dear Cyrus:

This letter will confirm your earlier conversation with Linda Ross in which she informed you that Mr. Brad Reed's office has told this office that he will not be available until after March 31, 1988. If you wish to make arrangements to depose Mr. Reed before then that is your concern. Mr. Reed is an employee of Tennessee

Higher Education Commission. Neither he nor the Commission are defendants in this case.

This will also confirm that Linda Ross has informed you that Mr. Frank Greathouse, of the Comptroller's Office, suffered a stroke in January 1988. He is not able to speak. Accordingly, this office has made no efforts to have Mr. Greathouse be available before March 31, 1988.

You refer to your letter of March 21, 1988 to the deposition of "Newspaper persons". It has never been my understanding that your client is interested in taking these depositions. I did mention that I might want to take the deposition of certain reporters. Subject to obtaining the necessary information on their present location and availability, I may wish to take such depositions, and therefore I request that you keep the afternoon of March 28, the day of March 29, and the afternoon of March 30 open for depositions.

With regard to Dr. Cox, he will be available for a deposition on his late filed exhibits on the afternoon of Monday, March 28, 1988, during all regular business hours on Tuesday, March 29, 1988 or the afternoon of Wednesday, March 30, 1988.

With regard to the late filed exhibits to Dr. Cox's deposition, our response is as follows:

7. Documents on the John Arthur lawsuit: Documents regarding this lawsuit were provided to you on March 14, 1988 when we deposed Mr. Lewis and Dr. Isibor.

12. A more recent non-instructional handbook than exhibit No. 10: I enclose the most recent handbook for non-instructional personnel. Since the handbook, at page ii, refers to Federick S. Humphries as the President of TSU, and since Dr. Humphries left TSU in 1987, it would probably be fair to assume that said handbook was in effect in May 1987.

13. Policy referred to by Dr. Cox on the difference between personnel action for cause and a personnel action not for cause: See exhibit No. 10, at Page 4. Also see Board Policies 5:01:00:00:00; at page 4, Policy 5:02:03:00, and Policy 5:02:03:10, and the other Board policies, which you have. There are no additional documents.

15. Documents on changes in status (demotions, changes for a fiscal year to an academic year, or changes from faculty to administrative) in the summer of 1987: The relevant documents, including personnel action request forms, are in the TSU personnel office in the custody of Margaret Wade. If you desire to inspect such documents, please let me know and these documents will be made available for your inspection at a mutually convenient time. Documents reflecting changes can be extracted from the mass of other personnel documents as easily by the plaintiff as by the defendant, and

therefore, I do not propose to either perform the extracting process or copy all of the voluminous documents for you.

17. Guideline No. P-110, "Non-Faculty Grievance Procedures", which was in effect in May, 1987: There was no guideline P-110 in existence prior to August 1987. However exhibit 12, the non-instructional handbook, contains, beginning at Page 23, procedures for filing a grievance. Note that P-110 is a guideline developed to assist universities in drafting their own procedures for addressing grievances.

19. Other incidents contributing to Dr. Cox's recommendation to remove plaintiff as Dean of the School of Engineering and Technology: Dr. Cox's perception of Dr. Isibor as an administrator was a factor. It is impossible to catalogue everything that contributed to that perception. The following incidents contributed to that perception:

a. Meeting in 1976 or 1977 of the President's Merger Advisory Committee at which Dr. Isibor displayed inappropriate behavior in response to Dr. Cox offering an opinion on something to do with the field of engineering.

b. Dean's council meetings from 1975 until approximately November, 1985 (after arrival of Dr. Burger):

(1) Plaintiff's loud fast speech during heated disagreements with Dr. Crowell. Sometimes plaintiff would disregard Dr. Crowell's request to modify his behavior.

(2) Plaintiff's intemperate attack on Evelyn Fancher.

(3) Plaintiff's excessive loudness at these meetings in general, including for example his loudness in presenting a proposed non-smoking rule.

c. Plaintiff's loudness during meetings in Dr. Crowell's office which was located near Dr. Cox's office.

d. Plaintiff's difficulties with instructional and non-instructional personnel:

(1) Yvonne Hodges

(2) Several clerical personnel who complained that Dr. Isibor had yelled at them, accused them of taking things from files, and accused them of incompetence.

(3) Employee who was alleged to have a gun in her pocket book.

(4) A number of former UTN engineering faculty who failed to come to TSU, or left soon thereafter, as a result of plaintiff.

(5) Plaintiff's pattern of generally making it difficult for independent-minded engineers to be on his faculty.

e. Disagreement over budget allocation and other issues concerning summer sessions, and Dr. Isibor's turning over of his responsibility to Dr. Malkani.

f. Plaintiff's treatment of Dr. Kumar.

g. Plaintiff's pattern of requiring

faculty to perform work at plaintiff's annual birthday party, and retaliation and unfair treatment to those individuals who refused to attend.

h. Plaintiff's pattern of obtaining only those grants which offered a substantial amount of money for the Dean's use as opposed to those grants which offered the bulk of the money for student scholarships, resulting in the loss of potential grant money. Related to this reason is the Atlanta University DOE grant, late filed exhibit no. 24 which was discussed at the deposition.

i. Plaintiff's pattern of going outside the University regardless of whether issues had already been fully aired and explained within the university, and of repeating the same accusations which had already been aired. For example:

(1) Plaintiff went outside the University on the issue of the name of the new engineering building after the

issue had already been decided by President Humphries.

(2) Plaintiff continued to raise the $59,000 issue, the One Million Dollar issue, the $200,000 issue (equipment) at informational meetings, during presidential search interviews, and at a spring faculty institute, after the accused officials had already provided explanations.

j. Plaintiff's having been put on probation by Mary Burger, and the circumstances surrounding probation.

The following incidents were previously discussed at the deposition:

k. Passing out the AIDS leaflet.

l. Refusing to yield the floor and move on to another issue during the Dean's meeting in January 1987.

m. Plaintiff's refusal to contine to attend Dean's Council Meetings.

n. Plaintiff's refusal to have meetings with Dr. Cox.

o. Plaintiff's participation in the grants which are the subject of the extra service pay claim.

p. Plaintiff's inappropriate behavior during the Dean's council meeting which discussed the staff reduction plan.

If I have failed to list above an incident which was already covered during the deposition, I am not signifying that Dr. Cox did not rely on that incident in making his recommendation or that the incident had no effect on Dr. Cox's perception of Dr. Isibor.

24. Documents on the 1982-83 DOE grant investigated by Cox and a request by Dr. Humphries in this regard: The files of the Vice-President for Academic Affairs do not contain these documents. Apparently said files are periodically purged, without reference to the pendency or non-pedency of lawsuits. The requested documents are not within my client's possession, custody, or control, and apparently

no longer exist.

25. OMB Circular: This ircular was provided to you on February 29, 1988 as paragraph 8 (a) in response to your letter of January 26, 1988.

26. Letter from Dr. Risby regarding Dr. Busby's request for payment on a DOE grant: I enclose a copy of an approval signed by Dr. Risby on April 30, 1987 in this regard. Although the document is in letter format, it obviously is not a letter since it is addressed to Dr. Risby and signed by Dr. Risby.

29. Name of the secretary who called Dr. Isibor's office in December 1986 and got the message that Isibor would require a written request for the meeting: Jewel Brazelton.

32. Dr. Cox's 1987 calendar used from October 1, 1987 through December 31, 1987: This document does not exist.

33. Notes on the meeting of May 7, 1987 with Dr. Bach, Susan Short, and Dr. Floyd: No such documents are in Dr. Cox's

possession, custody, or control.

Let me know when you want to depose Dr. Cox and I can arrange to have the Attorney General's conference room available.

Yours sincerely,

DAVID M. HIMMELREICH

Deputy Attorney General

DMH:dc

Enclosures

cc: Dr. George Cox

President Otis Floyd

Ms. Linda Ross

APPENDIX J.

EXCERPTS FROM THE

NASHVILLE BANNER, FRIDAY, MAY 17, 1985

CIVIC PETITION PUSHES

ISIBOR FOR TSU HEAD

More than 500 people have signed a petition endorsing Edward Isibor, Dean of the Engineering School at Tennessee State University, as TSU's next president.

The petition and letter were prepared by Nashville attorney Larry D. Woods and delivered to the office of State Board of Regents Chancellor Roy S. Nicks May 9.

Copies were also sent to the 18 members of the Regents board who will make the final decision about a new TSU President.

Some of those who have signed in support of Isibor's candidacy include J. William Denny, President of Nashville Gas Co.; Dr. David Satcher, President of Meharry Medical College; Sherman Nickens, Assistant Metro Police Chief; Tony Spratlin, Former TSU Student Government Association President;

Henry Hill, President of Citizens Bank; and Bill Calloway, Vice President for Public Relations at Service Merchandise.

Also signing were Bobby Jones, President of New Life Gospel Singers Inc.; T.B. Boyd III, President of the National Baptist Bublishing Board; Barry Oxford, President of Aladdin Resources; Richard Black, Chairman of the TSU Staff Senate; Nashville Attorney Russell B. Ennix; and Elizabeth Daniels, President of the Nashville Branch of the TSU Alumni Association.

The letter from Woods reportedly says the petitioners "strongly believe" that Isibor has the administrative and academic background as well as the "dynamism" that will project TSU to a new horizon of excellence.

Woods wrote that the signatures represent "Black, White and other ethnic members of the student, faculty and staff segments of Tennessee State University, TSU alumni and members of the general public."

This diversity of people, he said, shows that Isibor has behind him "a support base that can help unite the total community toward achieving the mission of TSU as set forth by the Board of Regents."

CERTIFICATE OF SERVICE

Edward I. Isibor, Pro Se, certifies that 3 true and correct copies of the foregoing petition for writ of certiorari are being mailed under U.S. Postal Certification with postage prepaid to Counsel for Defendants, Linda A. Ross, Charles W. Burson, David M. Himmelreich, Office of the Attorney General, 450 James Robertson Parkway, Nashville, Tennessee 37219-5025 and to William R. Willis Jr., Marrion F. Harrison, Willis and Knight, 215 Second Avenue North, Nashville, Tennessee 37201 on this 5th day of April 1990.

Edward I. Isibor

EDWARD I. ISIBOR
PRO SE
April 5, 1990

No. 89-1649

In The

Supreme Court of the United States

October Term, 1989

EDWARD I. ISIBOR,

Petitioner,

v.

BOARD OF REGENTS OF THE STATE UNIVERSITY AND COMMUNITY COLLEGE SYSTEM OF THE STATE OF TENNESSEE, ET AL.,

Respondents.

BRIEF OF THE RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS FOR REVIEW

1. Whether the Court of Appeals correctly concluded that the district court did not err in failing to recuse itself.

2. Whether the Court of Appeals correctly found no error in the district court's conclusion that respondent's interest in fulfilling its educational mission outweighed petitioner's free speech interest, and in its further conclusion that respondents proved by a preponderance of the evidence that petitioner would have been removed as dean even in the absence of his public statements.

3. Whether the Court of Appeals correctly concluded that the district court's findings regarding petitioner's Title VII claim were well supported by the evidence.

4. Whether the Court of Appeals correctly found that the district court had properly decided the issue of qualified immunity.

5. Whether the Court of Appeals inappropriately designated its opinion in this case as not for publication.

PARTIES TO THE PROCEEDING BELOW

The petitioner in this action is Edward I. Isibor. The respondents are the Board of Regents of the State University and Community College System of the State of Tennessee, Tennessee State University, former Chancellor Roy Nicks, in his official capacity, Chancellor Thomas Garland, President Otis Floyd, and Vice President George Cox, in both their official and individual capacities.

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OPINIONS BELOW

The opinion of the Court of Appeals is unreported, and is set forth at Petitioner's Appendix A. The unreported opinion of the district court is set forth at Petitioner's Appendix B.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on December 14, 1989. On December

22, 1989, a Motion for Extension of Time to File Request for Rehearing, until January 11, 1990, was granted. No request for rehearing was filed with the Court of Appeals. The petition for a writ of certiorari was filed on March 19, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

In 1987, the petitioner, a former Dean of the School of Engineering at Tennessee State University (TSU), filed suit in the United States District Court for the Middle District of Tennessee, pursuant to Title VII (42 U.S.C. §§ 2000e *et seq.*) and 42 U.S.C. § 1983. In his Title VII claim, petitioner alleged that he had been discriminated against on the basis of his race (black) with respect to his salary as dean, in that his salary was less than those of the white engineering deans at Memphis State University (MSU) and Tennessee Technological University (Tech.). Petitioner also alleged that he was removed from his position as dean in retaliation for exercising his First Amendment right to free speech, in violation of 42 U.S.C. § 1983.

Following a bench trial, the district court dismissed all of petitioner's claims. With respect to the Title VII claim of salary discrimination, the district court found that the respondents had articulated legitimate non-discriminatory reasons for the salary actions at issue and that petitioner had failed to carry his burden of persuasion that the articulated reasons were pretextual. (Pet.

App. B 83-87). As to petitioner's First Amendment retaliation claim, the district court, having reviewed the content, context, manner, time, and place of the specific instances of petitioner's speech, found that the interest of TSU in efficiently fulfilling its educational mission outweighed petitioner's interest in making such statements. (Pet. App. B 95-102). Further, the district court found that the respondents had proven by a preponderance of the evidence that petitioner would have been removed as dean even in the absence of his statements, given the overwhelming proof of petitioner's abusive, intemperate, and insubordinate behavior toward his supervisors, fellow faculty members, and employees of TSU. (Pet. App. B 102-107).

During the trial, after the conclusion of petitioner's case-in-chief and following five days of testimony, petitioner filed a motion to recuse, pursuant to 28 U.S.C. § 455(a). Petitioner asserted the existence of an appearance of partiality stemming from the district court's participation in prior judicial proceedings involving the desegregation of public institutions of higher education in Tennessee, including TSU. The district court denied the motion to recuse.

The Court of Appeals upheld the findings of the district court in all respects. After reviewing the facts established by the record relevant to petitioner's Title VII salary discrimination claim, the Court of Appeals concurred in the district court's findings of fact that petitioner had failed to prove that respondents' nondiscriminatory reasons for the salary differences among the engineering deans were mere pretext. (Pet. App. A 67-72).

In affirming the judgment of dismissal of petitioner's First Amendment retaliation claim, the Court of Appeals found, first, that the district court had reached the correct outcome in its application of the balancing test of *Pickering v. Board of Education*, 391 U.S. 563 (1968). (Pet. App. A 73-76). Further, the Court of Appeals concurred in the district court's finding that respondents proved by a preponderance of the evidence that petitioner would have been removed as dean even in the absence of any protected speech, citing the record's "overwhelming proof of [petitioner's] insubordinate and abusive behavior toward his supervisors, fellow faculty members and employees of TSU." (Pet. App. A 76).

Finally, the Court of Appeals found no abuse of discretion in the district court's denial of petitioner's motion to recuse (Pet. App. A 77-80), and no error in the trial court's decision on the individual respondents' qualified immunity as to petitioner's First Amendment retaliation claim. (Pet. App. A 80-81).

REASONS FOR DENYING THE WRIT

I.

PETITIONER'S JUDICIAL DISQUALIFICATION ARGUMENT DOES NOT WARRANT REVIEW BY THIS COURT

In the courts below, petitioner urged the disqualification of the trial judge, relying upon 28 U.S.C. § 455(a), which requires a judge to disqualify himself "in any proceeding in which his impartiality might reasonably be questioned." Petitioner argued below that recusal of the

district judge was required because of the judge's prior participation in the case of *Geier v. Alexander*, 593 F.Supp. 1263 (M.D. Tenn. 1984), *aff'd* 801 F.2d 799 (6th Cir. 1986), which involved the desegregation of public institutions of higher education in Tennessee. Having failed in his previous arguments on this issue, petitioner now abandons the grounds for recusal urged in the courts below and asserts, for the first time, another alleged basis for disqualification of the district judge. A basis for disqualification within the contemplation of 28 U.S.C. § 455 simply cannot be extracted from the allegations upon which petitioner now relies.

Petitioner's assertion of the specter of the "appearance of partiality" is based, tenuously at best, on the fact that the trial judge was formerly a member of the state legislature, was a democratic gubernatorial candidate in 1974, and served as State Treasurer, all of which facts were widely known at the time of trial. Petitioner apparently did not consider the issue worthy of notice at any point in the proceedings until he failed to gain the desired results from either the district court or court of appeals. A timeliness requirement is applicable to § 455 for the very purpose of eliminating the use of a disqualification issue as part of a litigation strategy. *Delesdernier v. Porterie*, 666 F.2d 116 (5th Cir.), *cert. denied*, 459 U.S. 839 (1982); *In Re International Business Machines Corp.*, 618 F.2d 923 (2nd Cir. 1980); *U.S. v. Conforte*, 624 F.2d 869 (9th Cir.), *cert. denied*, 449 U.S. 1012 (1980).

Petitioner also makes the conclusory allegation that the trial judge is part of a "Nashville Political Network" that also includes the governor, a local attorney, and the Chief Judge of the Sixth Circuit Court of Appeals, and

insinuates that the members of this group act to protect each other from exposure of their corrupt practices. Petitioner's allegations are unsupported and irrational. Moreover, this case involved no issue of alleged wrongdoing on the part of any member of this conjectural "network". "Disqualification is appropriate only if the facts provide what an objective, knowledgeable member of the public would find to be a *reasonable basis* for doubting the judge's impartiality." *In Re United States*, 666 F.2d 690, 695 (1st Cir. 1981) (emphasis original). It is beyond contemplation that an objective member of the public would reasonably believe that the trial judge would jettison his impartiality and ethical commitments as a judge in the context of this case, based simply on his prior government positions and his political affiliation.

All judges come to the bench with a background of experience, associations, and viewpoints. Litigants are entitled to a judge free of personal bias, but not to a judge without any personal history before appointment to the bench. *See Brody v. President & Fellows of Harvard College*, 664 F.2d 10 (1st Cir. 1981), *cert. denied*, 455 U.S. 1027 (1982) (fact of judge's graduation from defendant university not grounds for recusal); *Barry v. United States*, 528 F.2d 1094 (7th Cir.), *cert. denied*, 429 U.S. 826 (1976) (judge's prior position as United States Attorney does not require recusal unless case at issue arose before judge left that position).

While only citing 28 U.S.C. § 455(a), petitioner also appears to argue the existence of actual bias on the part of the trial judge, based on aspects of his rulings. (Pet. 22-28). Petitioner's arguments are based on misstatements of the record, the most glaring example of which is

his purported quotation of the trial court as having said of petitioner's witnesses, "I've said I'm going to disregard the other aspects of their testimony." (Pet. 27). What the record actually reflects is that, in a colloquy with the court, petitioner's attorney said that the fact that the witnesses had their personal opinions about *Geier v. Alexander, supra,* "is not a basis for disregarding other aspects of their testimony." The court responded, "Well, I don't know that I've said I'm going to disregard the other aspects of their testimony." (Tr. Vol. III 346-47). That is quite a different statement than the petitioner has represented to this Court.[1]

This case involves neither the appearance nor the actuality of bias on the part of the district judge, and review by this Court is unwarranted.

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[1] Petitioner's remaining arguments (Pet. 22-28) are similarly unfounded. The trial court's ruling with respect to petitioner's role in the overexpenditure of GE grant funds was substantiated by the audit report itself and the testimony of the internal auditor. (Tr. Vol. V 356-60, 373-86). The district court's finding that additional funds were allocated to the School of Engineering for equipment (Pet. App. B 99) is fully supported by the record. (Tr. Ex. 134). The issue of a difference between invoice and inventory costs for some computer equipment was explained as being the result of including the costs of separately priced components plus some equipment upgrades. (Tr. Vol. VI 42-51). The asserted "verdict" by the district court consisted of the court's indication, after hearing both cases-in-chief, that he viewed the evidence to that point to be "overwhelming . . . unless you convince me to the contrary in your rebuttal proof." (Tr. Vol. V 389, 390). Such a statement is no reflection of extrajudicial bias.

II.

THE COURT OF APPEALS CORRECTLY DISPOSED OF PETITIONER'S FIRST AMENDMENT CLAIM

The petitioner challenges the Court of Appeals' review of the particularized and fact-specific balancing test of *Pickering v. Board of Education*, 391 U.S. 563 (1968) and its concurrence in the district court's factual finding under the causation analysis of *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977). Further review by this Court of the fact-specific analysis of petitioner's First Amendment claim is unwarranted.

There is no specific instance of speech, no specific letter or statement, that petitioner points to as having supposedly caused his removal as dean. Rather, petitioner relies upon his pattern of outspokenness as a whole, and it is this pattern of outspokenness that must be weighed in the *Pickering* balance "between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." 391 U.S. at 568. In performing this balancing, the statements at issue will not be considered in a vacuum; the manner, time, and place of the expression are relevant, as is the context in which the dispute arose. *Connick v. Myers*, 461 U.S. 138, 152-53 (1983).

This is not a case in which a public employee acted primarily out of a desire to expose waste and wrongdoing. Petitioner's after-the-fact comments were uniformly directed at matters already publicly disclosed and usually

already investigated. What was involved was less a matter of speech induced by civic concern than an employment related dispute. Petitioner perceived himself to be the victim of a conspiracy to harass and discredit him that supposedly emanated from the level of the Board staff and used TSU employees in attempts to discredit petitioner and the School of Engineering, which would then provide an excuse for removing petitioner as dean. (Tr. Vol. III 150-51). It was no coincidence, then, that most instances of petitioner's outspokenness either came on the heels of investigations into his own mismanagement and were aggressive, defensive responses to those criticisms of him, or were efforts to discredit those persons whom he perceived to be plotting against him.[2] "To the extent that a public employee's expression is in furtherance of matters of personal concern, the public employer's burden of showing the predominance of the public's interest in continuing the efficient functioning of a public entity is lessened." *Joyner v. Lancaster*, 815 F.2d 20, 24 (4th Cir.), *cert. denied*, 484 U.S. 830 (1987); *see also*,

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[2] For example, petitioner's response to a TSU Internal Audit Report concluding that he had caused an overexpenditure of General Electric grant funds was to suggest that the audit was part of a witchhunt and that the Internal Auditor and the Vice President for Business and Finance were part of a "criminal network", siphoning off taxpayers' funds. (Tr. Exh. 102, 152). Petitioner's displeasure with a report of the State Comptroller's office, containing findings critical of petitioner, prompted a series of letters in which petitioner raised allegations of conflict of interest and insisted that blame should have been placed on the Vice President for Business and Finance. (Tr. Vol. III, 181-85).

Maples v. Martin, 858 F.2d 1546, 1554 (11th Cir. 1988) (Statements occurring in the context of longstanding acrimonious relations and disputes over internal policies are entitled to less weight.)

Petitioner's speech was characterized by its repetitive rehashing of issues, by its commentary on issues that had been disclosed, investigated, discussed, and grown stale. It was characterized by reckless accusations that reflected a failure to make reasonable investigation, and by baseless attacks on the personal integrity of fellow administrators with whom it was critical that petitioner, as well as the entire University community, be able to work cooperatively.[3] All of those factors weigh heavily against petitioner in the *Pickering* balance. *Egger v. Phillips*, 710 F.2d 292, 317 (7th Cir. 1983) (Criticism directed against a fellow employee necessarily implicates different interests of a public employer than would an impersonal

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[3] Despite having participated in the audit process concerning the overexpenditure of G.E. grant funds and despite being given the opportunity to present whatever information he had on the issue, long after the release of the final audit report petitioner chose to ignore its findings and persisted in asking questions fully answered by the report itself, and also asserted that the money at issue had been "misappropriated" by the Vice President for Business and Finance. (Tr. Vol. V 361-377, Vol. III 198-201). The issue of a one million dollar investment made by TSU through an investment firm that went bankrupt was the topic of wide-spread discussion. The problem was investigated, corrective measures were taken, and the money fully recovered. Petitioner's contribution to that discussion was to repeatedly contend, in the media and on campus, that the Vice President for Business and Finance had misappropriated or stolen the money. (Tr. Vol. 216, 440, 479).

criticism of the institution generally; frequent, redundant criticisms weigh against First Amendment protection.)

Petitioner's repetitive statements and allegations, made in the media and on campus to students, faculty, and other administrators, had the purpose and clear potential of precipitating a crisis of confidence in the competence and integrity of persons charged with the administration of TSU, and of thereby causing serious damage to the morale, efficiency, and public perception of the institution.[4] Under the facts of this case, the Court of Appeals correctly concluded that petitioner's speech did not fall within the protection of the First Amendment, when weighed in the *Pickering* balance against the interest of TSU in its effective functioning.

Petitioner's argument with respect to the *Mt. Healthy* causation analysis is based on fundamental inaccuracies in characterizing the evidence. The basic premise of petitioner's argument is that his mistreatment of personnel was not the reason for the decision by TSU President Floyd and Vice President Cox to remove him from his position as dean. (Pet. 35-36). That premise finds no support in the record. The decision to remove petitioner as dean was based on an on-going pattern of abusive, intemperate, overbearing, and insubordinate conduct on petitioner's part toward staff, faculty, and superiors, behavior deemed by the president and vice president to require

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[4] Petitioner's apparent argument that an actual, as opposed to potential or reasonably apprehensible, disruption is required (Pet. 39), has been rejected. *Connick v. Myers, supra* at 152.

new and different leadership within the School of Engineering. (Tr. Vol. II 106-09, Vol. III 495-96, Vol. VI 82, 85-86). Dr. Cox, who, as interim Vice President for Academic Affairs, recommended the removal of petitioner, based his perception of what he termed petitioner's "abusive leadership" on years of experience with petitioner's behavior, both on the basis of first-hand observation and in the form of complaints regarding petitioner that were made to Dr. Cox in his capacities as Assistant, then Associate Vice President for Academic Affairs, from 1975 until November, 1984, and as interim Vice President from August, 1986, through September, 1987. (Tr. Vol. I 253; Vol. III 375-80, 439-40, 496). On more than one occasion, Dr. Cox discussed with President Floyd his concerns about petitioner's abusive leadership (Tr. Vol. III 396, 495-96) and Dr. Floyd testified that the incidents involving petitioner of which he was personally aware and that had occurred subsequent to his becoming president in July of 1986 were ample reason to have accepted Dr. Cox's recommendation to remove petitioner. (Tr. Vol. VI 67-68, 82, 85-87).[5]

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[5] Petitioner's reliance on testimony regarding the concerns allegedly expressed by Chancellor Garland with respect to petitioner's outspokenness (Pet. 30-31) is misplaced and based on factual inaccuracies. Chancellor Garland's testimony was that his concerns about the effects on TSU of negative publicity were not focussed on petitioner. (Tr. Vol. II 53-59). The Chancellor, Dr. Floyd, and Dr. Cox all testified that the Chancellor had no input into the decision to remove petitioner (Vol. II 48, 59, 74, 89), and Floyd and Cox were not aware of any concerns on the Chancellor's part regarding petitioner's outspokenness. (Tr. Vol. I 264-65, 356). Moreover, any such sentiments of the

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Petitioner argues that Dr. Cox voted in favor of petitioner being a candidate for the presidency of TSU, and that such an action precludes the existence of any non-retaliatory reason to remove him as dean. (Pet. 39-42). Petitioner omits any reference to Dr. Cox's explanation for that action. Dr. Cox testified that the search committee was deadlocked and that he agreed to include petitioner as one of the finalists because he felt that, if the committee interviewed petitioner, they would see some of the same behavior that Dr. Cox had witnessed over the years and would not support petitioner. (Tr. Vol. IV 61-63). In fact, petitioner was ultimately not recommended by a single person on the search committee. (*Id.* 62).

Finally, petitioner cites his accomplishments as dean. While the record raises questions about the true extent of his achievements, Drs. Floyd and Cox did, nevertheless, recognize that petitioner had made contributions to the School of Engineering. However, whatever his accomplishments in that area, they came at a price, and that price was his abusive, intemperate, and overbearing behavior toward staff, faculty, and supervisors. Drs. Cox

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Chancellor are irrelevant to both the *Pickering* balancing test and the *Mt. Healthy* analysis.

Petitioner's suggestion that Dr. Floyd was "paid off" for removing petitioner by four salary increases in one year (Pet. 12, 41) is not warranted by the facts. In July, 1986, Dr. Floyd received an increase when he became interim president; in January 1987, all presidents received a salary increase; in March 1987, Dr. Floyd's salary increase was due to his being named permanent president; in July 1987, all presidents received an increase. (Tr. Vol. V 56-57).

and Floyd concluded that that price outweighed the benefit and that new leadership was needed. The evidence is overwhelming that they would have reached that decision even in the absence of petitioner's speech.

III.

THE COURT OF APPEALS CORRECTLY DETERMINED THAT THE DISTRICT COURT'S FINDINGS OF FACT ON PETITIONER'S TITLE VII CLAIM WERE WELL SUPPORTED BY THE RECORD

Petitioner's argument with respect to his Title VII claim turns solely upon an analysis of the particular facts involved. Having been defeated in the Court of Appeals, petitioner seeks still another hearing and asks this Court simply to undertake a review of concurrent findings of fact by the two courts below. Further review of these questions of fact is unwarranted.

Petitioner persists in this Court, as he did below, in disregarding the facts established by the record which fully support the finding that petitioner failed to carry his burden under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981), of proving that the nondiscriminatory reasons offered by the respondents were pretextual.[6] The Board of Regents operates a decentralized system, with salary recommendations for all personnel except the university president being generated

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[6] Contrary to petitioner's apparent assertion (Pet. 45-46), respondents did not contend that seniority and degree field were relevant to the salary decisions at issue.

from each of the institutions. There is no effort made to impose a uniform salary for the same position throughout the system and, in fact, there is substantial variance in salary levels from campus to campus. (Tr. Vol. V 36, 71). The salary of each campus president is set by the Chancellor of the Board of Regents and relates to the size and complexity of the institution as a whole. (*Id.* 31, 115-116).

Within that general framework, there are certain policies at work, one of which is that the salary of the president operates as an upper limit, or cap, on the salaries of the other personnel at that institution. (*Id.* 32, 116). This policy directly affected a salary decision with respect to the petitioner that was made during one of the three years covered by his Title VII claim.[7] For the 1984-85 academic year, the president of TSU proposed a salary for petitioner that exceeded the salary that the Chancellor had set for the president for that year, a fact of which the president was unaware at the time he made his recommendation. (*Id.* 46-47, 121). When this fact was brought to the president's attention by the Chancellor, the president reduced his recommendation for petitioner's salary. (*Id.* 122). As a result, petitioner's salary for 1984-85 was set at $662 below that of his president; the deans of engineering at MSU and Tech received salaries approximately $9,800 and $3,400 less than their respective presidents. (*Id.* 48-49).

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[7] The district court ruled prior to trial that petitioner's salary discrimination claim was restricted to the period from January 9, 1985 until June 30, 1987, the date of his removal as dean. (Pet. App. A 65). Thus, specifically at issue were the salary decisions made with respect to petitioner for the years 1984-85, 1985-86, and 1986-87.

In an effort to show pretext, petitioner argues that for one year, 1986-87, the dean of engineering at Tech was paid $196 more than the interim president of that institution. Both courts below have rejected that argument, finding that that salary differential was reasonable as being a unique circumstance created by the presence of an interim president. (Pet. App. A 70-71; B 86-87). The fact remains that no exception was ever made in the Board of Regents system to allow the salary of any dean of engineering to exceed the salary of a permanent president. (Tr. Vol. V 35).

The salaries of the deans of engineering at Tech, MSU, and TSU also reflected the relative size and complexity of the engineering programs, with Tech's program ranking as the most complex and TSU's as the least. (*Id.* 97).[8] The relative salaries of the respective deans of engineering corresponded to this ranking as to size and complexity, with the exception that in 1986-87 the salary of the dean at MSU exceeded by $504 that of the dean at Tech. In that particular year, MSU was able to give greater salary increases than were Tech or TSU because of a

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[8] In an attempt to support his assertion of comparability between the TSU and MSU programs, petitioner inaccurately states the evidence on the point. In 1981, in response to petitioner's demand for a salary increase, then-Chancellor Nicks determined that "the complexities of the [engineering] programs at the three institutions were not comparable." (Tr. Vol. V 117). Nevertheless, because there was "some degree of comparability" between the MSU and TSU programs at that time, he was willing to support increasing petitioner's salary to the level of the MSU dean for 1981-82. (*Id.* 117-119). There was never any agreement that petitioner's salary would or should always remain equal to that of the MSU dean. (*Id.* 119).

larger pool of funds resulting from increased student fee revenues. (*Id.* 43-44). The correlation between salary and size and complexity of the engineering programs was less apparent at the level of associate or assistant dean, a fact that both lower courts rejected as proof of pretext because those positions are not fairly comparable given the variation of their duties and functions from university to university. (*Id.* 70-71).

With respect to the second of the three years encompassed by petitioner's Title VII claim, 1985-86, the salary increase recommended for petitioner by the TSU president through the normal budget process was fully approved. (*Id.* 54-55). A belated recommendation from the president, made upon his departure from TSU, for an additional "equity adjustment" to petitioner's salary was viewed by the Board staff as unusual and was submitted to TSU's new interim president for review. (*Id.* 51-52). Despite petitioner's assertion to the contrary (Pet. 52), the undisputed testimony of the interim president was that he did review that proposed action and chose not to resubmit it to the Board. (Tr. Vol. IV 196-98). In 1986-87, the recommended increase in petitioner's salary was fully approved by the Board.

The evidence relevant to petitioner's Title VII claim has been fully reviewed by both the district court and Court of Appeals and found insufficient to support a conclusion that the salary decisions with respect to petitioner were motivated by his race. Further review of these facts by this Court is unwarranted.

IV.

THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE DISTRICT COURT PROPERLY DECIDED THE ISSUE OF QUALIFIED IMMUNITY

Under the particularized analysis required by *Anderson v. Creighton*, 483 U.S. 635 (1987), respondents Garland, Floyd, and Cox were clearly entitled to qualified immunity from damages arising from petitioner's First Amendment claim. The district court had before it the results of extensive discovery which presented undisputed evidence concerning the content, form, context, time, place, and manner of petitioner's speech. The undisputed evidence reflected elements of personal interest and vindictiveness as the motivation for petitioner's speech, repetitive raising of stale issues, repeated assaults on the personal integrity of fellow administrators, and a propensity to recklessly make baseless and false allegations. Based on that evidence, reasonably competent officials could have disagreed on whether and to what extent petitioner's comments were protected by the First Amendment.

The result is not affected by the letter written by the Board's General Counsel, referred to by petitioner. (Pet. 56). That letter simply contained a broadly stated reference to a general First Amendment right. It contained no particularized assessment of whether a specific instance of speech by petitioner was protected by the First Amendment.[9]

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[9] That letter, which was not directed to the Chancellor, stated, "Any correspondence with Dean Isibor relating to

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V.

PETITIONER'S CHALLENGE TO THE COURT OF APPEALS' DETERMINATION AS TO PUBLICATION OF ITS OPINION IN THIS CASE IS WITHOUT MERIT

Rule 24 of the U.S. Court of Appeals for the Sixth Circuit sets forth the criteria to be considered by panels in determining whether decisions will be designated for publication in the Federal Reporter.[10] The rule also provides that citation of unpublished decisions is disfavored, unless "counsel believes . . . that an unpublished disposition has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well", in which case such a decision may be cited. Rule 24(c).

The decision of the Court of Appeals in this case was designated by the panel as not recommended for full-text publication. Petitioner's argument that this poses an "undesirable restriction to full access to the total record in this case", which will "hide the truth from the public" (Pet. 58) and be used "to conceal the unfair decision in this case" (*Id.* 61), is without merit. The full record in this

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communications regarding the audit of activities in the School of Engineering should not include reference to any procedure which may be perceived to 'chill' the First Amendment rights of any faculty or administrator."

[10] Those criteria include (i) whether it establishes a new rule of law; (ii) whether it creates or resolves a conflict of authority; (iii) whether it discusses a legal or factual issue of continuing public interest; (iv) whether it is accompanied by a concurring or dissenting opinion; (v) whether it reverses the decision below.

case is open to the public, and the provisions of Sixth Circuit Rule 24 have neither the purpose nor the effect of cloaking decisions in secrecy. Review by this Court of this issue is unwarranted.

CONCLUSION

The petitioner has failed to provide any reason for this Court to grant the petition for writ of certiorari. The court below has not rendered a decision in conflict with the decision of any other federal court of appeals or of this Court, has not decided an important, unsettled question of federal law, and has not acted in a manner calling for an exercise of this Court's power of supervision. The petition presents primarily questions of fact which do not merit Court review. Accordingly, respondents urge this Court to deny the petition for writ of certiorari.

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No. 89-1649

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

EDWARD I. ISIBOR,

Petitioner

V.

BOARD OF REGENTS OF THE STATE UNIVERSITY AND COMMUNITY COLLEGE SYSTEM OF THE STATE OF TENNESSEE, ET AL.,

Respondents

REPLY BRIEF OF THE PETITIONER TO THE BRIEF OF THE RESPONDENTS

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May 18, 1990

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REASONS FOR APPROVING THE WRIT

1.

REFUSAL OF TRIAL JUDGE TO RECUSE HIMSELF IN THIS CASE WARRANTS REVIEW BY THIS COURT IN ITS SUPERVISORY CAPACITY

The Respondents in their brief mischaracterize the Petitioner's argument on this assignment of error. Contrary to the Respondents' claim, Petitioner does not allege that the trial court's prior participation in the desegregation case of Geir v. Alexander, 593 F. Supp. 1263 (M.D. Tenn. 1984), required that the judge disqualify himself. Rather such a recusal was warranted in this case because of the expressed inability on the part of the trial judge to separate in his mind certain perceptions about petitioner and petitioner's proof from certain anti-desegregation forces external to the trial itself. The trial court expressed bias in this manner

"This court can't exclude from

> its mind the experience that it has had with desegregation efforts at Tennessee State University since I came on the bench in 1978. And the difficulties that have been experienced with a faction of people in this community and in the TSU Community who oppose the integration of TSU....."
> (TR III Court 342-347)

This charge was not introduced at trial by either the petitioner or the respondents. It was introduced into the case by the trial judge himself. The trial judge took a stance as that of a surrogate lawyer for the respondents, searching for a reasonable basis to justify the termination decision. On at least thirteen occasions, Judge Wiseman interrupted the testimony of petitioner's witnesses to inquire as to whether petitioner was also a member of the faction opposed to the desegregation efforts.[1]

[1] TR I -36 Line 19 to 25, TR II-276 Line 25
TR I -37 Line 1 to 25, TRII-278 Line 1-25
TR I -38 Line 1 to 13, TRII-282 Line 1-25
TR I -39 Line 19 to 25, TRIII-345 Line 13-25
TR I -40 Line 1 to 16, TRIII-346 Line 1-25
TR I -74 Line 1 to 25, TRIII-347 Line 1-18
TR II-275 Line 25

The trial judge was so entrenched in his bias against the petitioner that he left no room in his mind for the truth. For example during the testimony of Rev. Wallace Smith, the court asked this question repeatedly

"The Court:: Did you see him (Isibor) as representing a constituency that was interested in maintaining the Black identification of Tennessee State University?" (TR II - Court -276)

After the witness responded by saying "No, I think Dr. Isibor, as I understand it is quite a univeralist," (TR II - W. Smith - 278).

The trial court continued to display a contrary persuasion by stating

"I gather from your testimony that you saw him as representing a constituency in this dependent/independent black/white issue, that he represented a constituency that wanted to keep TSU black, is that right or not? (TR II-Court-278).

In light of the court's candid disclosure of its problem in objectively viewing the testimony of the petitioner's key witnesses it is ironic that the judge did not

recuse himself. Strong policy reasons require recusal in such situations:

> "(B)ecause of their positions of great public responsibility, District Judges often must walk a very narrow course in performance of their jobs on the bench. A District Judge---- must scrupulously avoid giving the parties or the public any basis for perceiving that he is deciding the case otherwise than pursuant to an application of controlling law to the facts and in the exercise of his impartial, independent, considered judgment." (No emphasis added).

Southern Pacific Communications Co. v. American Telephone and Telegraph, 7400 F. 2d 980, 984 (3rd Cir. 1984)

In its supervisory role, this court review is warranted to determine the source of the trial judge's charge that the petitioner belong to a faction opposing desegregation. Neither the petitioner nor any of his witnesses had ever appeared before Judge Wiseman in the Geir v. Alexander lawsuit. The petitioner only appeared before Judge Thomas Gray under a subpoena and he testified strongly in favor of integration. The respondent Board of Regents, and the Governor of the State

were against the merger of TSU (The Historically Black institution) and UTN (the Predominantly White institution). Also in his work, the petitioner produced the highest increase(3,260%) of the other race (white students) population at the School of Engineering and Technilogy under his deanship. The Petitioner, in addition, created the "Ebony and Ivory Scholarship Ball" to draw the total community together in support of the University.

There is a disturbing indication that the tainted impression of the petitioners case remained throughout the trial. For instance in the ruling of the trial court, there is a conspicuous absence of any mention of such key witnesses as Samuel Latham, Fred Humphries or Richard Lewis.

The respondents misquoted the record when they claimed the following statement is on record:

"Well, I don't know that I've said I

am going to disregard the other aspects of their testimony." On the contrary, the record as prepared by the trial courts' clerk stated as follows:

"The Court: Well, I don't know that --I've said I am going to disregard the other aspects of this testimony."

(TR III-Court-346-347)

The gap left in the record between "that" and "I've" was disregarded by the respondents in their brief. However the record shows several other instances in which the court threatened to ignore the testimonies of several witnesses of the petitioner. For example in (TR I-Court-103) the court said "I'm not going to consider any of that testimony Ms. Wayt". and in (TR I-Court-132) the court stated "All this, all this testimony will be stricken. Go ahead." The petitioner realizes that in a lawsuit irrelevant issues are expected to be stricken from the record. The only unusual thing is that the trial judge introduced in some irrelevant

issues to help the respondents and completely ignored key testimonies on the petitioner's side that he did not rule on as irrelevant.

Contrary to the respondents' claim the petitioner and his attorney did not know of the extent of the prior involvement of the trial judge with the state government and the local political network. The petitioner came to Nashville in 1975 and therefore was unaware that the trial judge was a democratic gubernatorial candidate in 1974. It is not normal for a litigant to carry out a discovery on the judge before trial when he was unaware of any justifying information. Therefore, the citied authorities such as Delesdenier v. Poterie, 666 F. 2d 116 (5th Cir.) cert. denied, 459 US 839 do not apply in this instance.

The petitioner does not assert that the trial judge ought to have recused himself simply because of his prior experience,

associations and viewpoints. But the petitioner asserts that such a recusal is expected if prior background creates a personal bias in the judge's mind that will obstruct justice. See Brody v. President & Fellows of Harvard College F2d 10 (1st. Cir. 1981), cert. denied, 455 US 1027 (1982).

Several issues can be cited in this case to demonstrate the actuality of bias on the part of the district judge. For instance, the respondents point to the Audit Report and the testimony of Connie Wilkinson to support their argument that about $59,000 was overspent on the General Electric grant. The sequence of events[2] in this case clearly demonstrates the bias of the trial judge.

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2 (a) On sept. 19, 1986, the petitioner wrote a letter to Cox requesting the requisitions that led to the alleged overexpenditure. (b) On Oct. 22, 1986, during a faculty meeting Dr. Chaudhuri

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This court is the only one in a position to serve the public good by providing an avenue for demanding production of the invisible requisitions that allegedly led to the overexpenditure. Therefore further review of the facts by this court is needed.

2.

THE COURT OF APPEALS ERRED IN RULING ON THE PETITIONER'S FIRST AMENDMENT CLAIM

The overiding theme of petitioner's speech involved the mismanagement of

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narrated how a false overexpenditure was declared on his NASA research grant, (c) Then on Nov. 3, 1986 faculty members sent a letter to Cox again demanding copies of the requsitions in question on the GE grant. (Page 0990 Joint Appendix) (d) Months went by and the requisitions were not produced. Therefore during discovery in this lawsuit, the petitioner demanded production of the requisitions. (e) The respondents refused to produce the document. Instead they filed a motion to the court not to be forced to produce the requisitions. (f) On sept. 7, 1988 Judge Wiseman, surprisingly, ruled that the respondents did not have to produce the requisitions with a condition when he said: "The Court:----For the present, I'm going to quash the subpoena duces tecum. And Ms. Wood is subpoenaed and if it becomes apparent that you're

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public university funds. This has been uniformly held to constitute a matter of public concern. The closest analogous case standing for this proposition is, of course, Pickering v Board of Education 391 US 563, 568, (1968). However, this threshold determination has been applied repeatedly to the University setting. See e.g., D'Andrea v. Adams 626 F. 2d 469 (5th Cir. 1980) (University professor protest-

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unfairly treated in this matter, Mr. Booker, I reserve the right to reverse the right to reverse myself.---." (g) Petitioners testimony in this regard was summarized as follows by the court: The Court: Yes, it was, but in your rebuttal proof, when Dr. Isibor raised it again and said the $59,000 that he never had overspent----he never had overspent a grant one nickel, and that was the reason he was demanding of the University Audit Office the requisitions for expenditures because he had'nt overspent one nickel. (TR VI - Court - 281). (h) On October 14, 1988 Judge Wiseman made his ruling from the bench and without any substantiating evidence (such as the requisitions) he said:

"It appears to the court that the overexpenditure resulted from requisitions originating in the office of Dr. Isibor himself." Dr. Isibor made requisitions and expenditures

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ing to state officials regarding the alleged improper use of university funds held protected even though no factual foundation existed for such allegations.) The petitioner also spoke out in regards to violation of the University hiring policy, the autonomy of the University and conflict-of-interest relationships. At trial, several faculty members, alumni, students and members of the general public testified that all the issues that the petitioner spoke on were public concerns and not personal issues.[3] These issues were discussed repeatedly on the news-media. The petitioner was invited on several occasions to share information regarding these issues with the public. Attempts to resolve them internally were unproductive. Even state officials were

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then against both of them. He well knew the answer to the question he continued to ask or he should have known the answer because he caused the problem himself."

uncooperative in this regard. For instance Prof. Elizabeth Wayt (a White lady with more clout) brought up a charge against Ron Dickson of fraud in the purchase of some computer equipment. She could not find anyone at tne State Board of Regents office to look into it. Then she contacted Mr. Frank Greathouse, the Auditor in the State Comptrollers office. In a telephone conversation, Prof. Wayt testified that Mr. Greathouse told her:

> "---that there would be no need to have an investigation; that he put Mr. Dickson at Tennessee State and he would go to the wall for him."
> (TR I Wayt 112)

The Trial Court and the Court of Appeals failed to consider the fact that the petitioner was a candidate for the

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Prof. Chaudhuri TRII - 238-240
(Student) Gregory Carr TRI-274-288
(Alumni) Ronnie Smith TRI-26-112
Dean Regina Monnig TRI 395
Prof. Ernest Rhodes TRII-187-190
Prof. Jacquelin Mitchell TRII-352-
Prof. Ray Richardson TRII-290-345
Rev. Wallace Charles Smith TRII-259-287
Prof. Elizabeth Wayt TRI-100-137

presidency at the university from 1985 to 1987. Therefore he made several political statements in regards to the university problems and what he would do to resolve them. The issue of fiscal management was the number one topic at the university and in the community. Respondent George Cox testified that all of the issues that the petitioner had raised were discussed publicly throughout the TSU campus and by all the finalists for the presidential position. (TR III Cox 479-482).

Moreover, even if it could be shown that petitioner was motivated purely out of some personal interest in making his remarks, such a finding would not serve as a constitutional basis for retaliation. Even where Myers' questionnaire was in large part of a personal grievance against her transfer, the United States Supreme Court stated in Connick v Myers, 461 U.S. 138 (1983) that her questionnaire "touch(ed) upon matters of public concern." Id at 154.

(There, one question out of fourteen touching a matter of public concern was held adequate to invoke constitutional protection.) The respondents are incorrect in claiming that "There is no specific instance of speech, no specific letter or statement, that petitioner points to as having supposedly caused his removal as dean." The petitioner had testified during trial that his outspokenness regarding the one million dollar investment and directed attention to his letter of Dec. 15, 1986 to Governor McWherter in which he charged state officials of conflict-of-interest relationship, mismanagement of funds and informed the governor of some "smoke" in higher education in the State of Tennessee that needs to be put out before it becomes a major disaster. These actions tilted the respondents to removing the petitioner from the deanship. Respondent Garland testified that senior members of his staff were very displeased regarding petitioner's comments

on how Mr. Ron Dickson (a former member of staff of the State Board of Regents) misinvested one million dollars of the University funds.

The record shows that the public good was served by the petitioner's persistence for the truth. The respondents regarded this as repetitive rehashing of issues without pointing out that the petitioner's persistence in his inquiry to allegations of mismanagement of funds proved well-founded since many of the pat answers provided by the administration were incorrect and misleading.[4] The petitioner was targeted for termination because he failed to acquiesce what is perceived as a negative image in the media at the expense of full disclosure on significant issues of public concern.

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[4] a. Through the petitioner's persistence the respondents admitted at trial that actually 4 million dollars was invested out-of-state with Brittenum and

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The Courts below relied heavily on Ron Dickson's vague perception that the petitioner's speech reduced the level of trust in him or his staff. Several factors discredit this vague perception and its use as a basis for the court's conclusion. First Ron Dickson himself testified that no one had ever indicated to him that plaintiff's speech on these issues reduced their level of trust in him or his staff. (TR IV ickson 485). Secondly the matter of fiscal mismanagement discussed by the petitioner was already a controversial issue and the subject to regular media commentary. All three candidates for Presidency of TSU spoke on fiscal mismanagement topics in their campaign. The Courts below ignored this fact. Respondent Otis Floyd spoke as much as the petitioner on this subject when

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Associates instead of the 1 million they had claimed earlier. (TR IV Dickson 486)
b. The uncollected or the actual loss of revenues on the video game contracts was first estimated by the respondents to be only 50 dollars, then the figure was changed repeatedly to 2500 dollars 2600 dollars and finally respondent Floyd established it to be about 80,000 dollars. (TR II Floyd 77)

he was a candidate for the presidency. Thirdly Dickson was singled out (in his position as the Vice President for Fiscal Affairs at TSU) by several groups and individuals as being at least partially responsible for one million dollar misinvestment. Ron Smith, the local president of the TSU alumni wrote and spoke publicly in this regard (Page 955 to 961 Joint Appendix). Also the Nashville Rainbow Coalition under the leadership of Rev. Fuzz wrote letters investigating the million dollar misinvestment. (Page 951 to 954 Joint Appendix). Thus Ron Dickson had reason to feel that the level of the community's perception of the integrity or competence of his office had declined.

Finally the court's emphasis on this testimony to support its finding on this point is misplaced. Ron Dickson was not in the category of personnel with whom the petitioner was required to deal with on a daily basis. To borrow from the

reasoning in Pickering, the petitioners employment relationship with Dickson was "not the kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary for their proper functioning" 391 U.S. at 570

The respondents did not dispute the testimonies cited by the petitioner from the record in which both respondent Cox and respondent Floyd declared that the alleged mistreatment of personnel as irrelevant to their decision to terminate the petitioner. (See TR I Cox 359-360) and (TR VI Floyd 68). The reliance of the courts below on this issue in making their rulings therefore justifies a review by the Supreme Court. Respondent Otis Floyd testified, both, on page 136 of his deposition and in (TR II Floyd 72) during trial that he had no just cause that could have led him independently to remove Dr. Isibor as dean, absent Dr. Cox's recom-

mendation to do so on May 29, 1987. Therefore the record is devoid of letters of reprimand on the alleged "ongoing pattern of abusive behavior" claimed by the respondents.

3.

THE COURT OF APPEALS ERRED IN DENYING PETITIONER RELIEF UNDER TITLE VII

The respondents in their brief did not dispute the fact that the testimony of respondent Roy Nicks that was cited is on the record. The Court of Appeals and the Trial Court erred in failing to consider this testimony. First, Nicks asserted that salary decisions for engineering deans were based on a study conducted in 1979-1980, (TR V Nicks) and that he found a degree of comparability between the engineering programs at TSU and MSU. Second, Nicks answered questions in these words:

"Q. And that based on that, you had approved Dr. Isibor's salary being equal to the Memphis State

dean's salary in 1981-82

A. Yes

Q. And again the following year

A. Yes" (TR V Nicks - 138) (Emphasis Added)

Third, Nicks admitted that without any justifiable reason the salary of the Memphis State Dean was made higher in later years than that of the petitioner. This change was not warranted by a new study. (TR V Nicks-139)

CONCLUSION

For all of the foregoing reasons a writ of certiorari should be issued to review the judgement of the United States Court of Appeals for the Sixth Circuit.

Edward I. Isibor

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